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SUPREME COURT OF THE UNITED STATES.

No. 781.

THE UNITED STATES, APPELLANTS,

vs.

DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 23, 1878.

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1 I.—*Petition.*—*Filed Feb'y 8th*, 1876.

In the Court of Claims of the United States.

DENVER PACIFIC RAILWAY AND TELEGRAPH Company, claimant, *against* THE UNITED STATES, DEFENDANT. } No. 10904.

To the honorable the judges of the Court of Claims:

The Denver Pacific Railway and Telegraph Company, for cause of action, shows to the Court—

I. It is a corporation duly incorporated under the laws of the Territory of Colorado.

II. The Kansas Pacific Railway Company is a corporation duly incorporated by an act of the legislature of the Territory of Kansas, passed in the year one thousand eight hundred and fifty-five, and entitled "An act to incorporate the Leavenworth, Pawnee and Western Railroad Company."

III. The name of said corporation has since been legally changed, first to the "Union Pacific Railway Company, Eastern Division," and then to the "Kansas Pacific Railway Company."

IV. By an act of the Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government
2 the use of the same for postal, military, and other purposes," approved July 1st, 1862; the act amendatory thereof, approved July 2nd, 1864; a resolution of Congress, approved May 7th, 1866; and an act of Congress, approved July 3d, 1866, the Kansas Pacific Railway Company was authorized to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to a point on the Union Pacific Railroad not more than fifty miles westwardly from the meridian of Denver, in Colorado; and it was therein provided that the said Kansas Pacific Railway should enjoy all the rights, privileges, and benefits conferred by the acts of Congress upon the Union Pacific Railroad Company, except that by the last-mentioned act it was only to be entitled to the same amount of bonds of the United States to aid in the construction of its line of railroad and telegraph as it would have been entitled to if it had connected its line with the Union Pacific Railroad on the 100th degree of longitude.

V. On March 3, 1869, said Kansas Pacific Railway Company had completed its road to Sheridan, a distance of 440 miles from the Missouri River and 225 miles from Denver, and had previously thereto received from the United States $6,303,000 in bonds, being the number of bonds it would have been entitled to if it had connected with the Union Pacific Railroad on the 100th meridian, namely, at the rate of $16,000 per mile on 393$\frac{5}{16}$ miles of its road westward from the Missouri River, and which was the entire pecuniary aid to which it was entitled.

VI. On that day was passed an act of Congress, entitled "An
3 act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado," and which act is set forth as exhibit B hereto, and in pursuance thereof the Kansas Pacific

Railway Company did, on March 19th, 1869, contract with the Denver Pacific Railway and Telegraph Company for the construction, operation, and maintenance of its line from Denver to its point of connection with the Union Pacific Railroad at Cheyenne, and granted and transferred to it all the rights and privileges subject to the obligations pertaining to that part of its said road, a copy of which contract and grant is hereunto annexed, marked C.

VII. The Kansas Pacific Railway Company, in pursuance of said last-mentioned act, proceeded to complete its railroad from Kansas City, connecting there with the Missouri Pacific Railroad, to Denver, connecting there with the line of said Denver Pacific Railway and Telegraph Company, and completed same in August, 1870, and the Denver Pacific Railway and Telegraph Company mortgaged its road from Denver to Cheyenne for the sum of two million five hundred thousand dollars to enable it to borrow money to construct the same, and issued and sold its bonds secured by said mortgage and with the funds so obtained constructed its railroad from Denver to Cheyenne, in the Territory of Wyoming, and completed same on or about July 1st, 1870.

VIII. By virtue of the act of Congress of July 1st, 1862, and the various acts amendatory thereof, above mentioned, and of said contract
4 and grant, the rights, powers, donations, grants of lands, rights of way, privileges, and franchises, granted to the Kansas Pacific Railway Company for the construction of that portion of its line between Denver and Cheyenne became vested in said Denver Pacific Railway and Telegraph Company, as assignee of said Kansas Pacific Railway Company, as aforesaid, for the purpose of aiding the claimant in the construction of its railroad and telegraph line.

IX. No bonds or pecuniary aid of any description was given by the United States to the claimant, but its railroad was duly approved by the President, and it has received the grant of the alternate sections of land along its line of road given by said acts of Congress to aid in the construction of the various Pacific roads, and to which it had become entitled by the duly authorized assignment from the Kansas Pacific Railway Company, hereinbefore mentioned.

X. Claimant submits that the grant aforesaid was made upon condition that the company should keep such railroad and telegraph line in repair and use, and should at all times transmit dispatches over said telegraph line, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad, for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service, but that such grant was not upon condition that said company should pay at maturity the bonds issued to the Kansas Pacific Railway Company, as aforesaid, or any part thereof, or apply any part of the earnings
5 of said Denver Pacific Railway and Telegraph Company, or any part of any moneys due to it by the government, to the payment of said bonds.

XI. The claimant has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the said government.

XII. The claimant has rendered services to the Government of the United States in the carriage and transportation of the United States mails for the Post-Office Department over the railroad of the claimant,

and such services, the times when they were rendered, and the value, and amounts due the claimant for such services, are fully specified in the account annexed, marked "A."

XIII. The rendering of such service has created a contract on the part of the United States Government to pay for the same.

XIV. In all settlements for postal service previous to those specified in the account above referred to, performed on the railroad of the claimant, the United States Government has recognized the right to full payment therefor and has made due payment for such service, without deduction on account of any debt due by the Kansas Pacific Railway Company to the United States.

XV. Since said date the United States Government has paid nothing to the claimant, or to any other person or corporation, for such service, and there is now payable to said Denver Pacific Railway and Telegraph Company for such services, as shown by the account above referred to and hereunto annexed, the sum of $58,260.00.

6 XVI. The Denver Pacific Railway and Telegraph Company is the sole owner of said claim, and the consideration therefor is the mail service actually performed by said company for the Post-Office Department as above stated.

XVII. Demand has been made of the Postmaster-General for payment of the amount due the claimant for the mail service above claimed, and payment has been refused.

XVIII. The Post-Office Department at the request of claimant then referred such claim to the Attorney-General of the United States for his opinion as to the justice thereof, and the Attorney-General rendered an opinion adverse to the right of claimant to any payment whatever, a copy whereof is hereunto annexed, marked "D," which opinion shows the action of the government on the claim of said Denver Pacific Railway and Telegraph Company.

XIX. The claimant submits that there is no just ground whatever for alleging that it has received a grant of land, or other privileges, or franchises, on condition that it should pay the debts of the Kansas Pacific Railway Company to the United States, or that it is in any way liable to pay such debts or any part thereof, or transport the mails for the United States free of charge, but that, on the contrary, the only conditions attached to its land grant are those contained in section 6 of the act of Congress of July 1st, 1862, which are applicable to a railroad not receiving any pecuniary subsidy, and which are set forth in paragraph X of this petition.

Wherefore the claimant prays judgment—

I. For the sum of $58,260.00.

7 II. For such other and further relief in the premises as may be just and equitable.

THE DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY, [L. S.]
Petitioner.

[SEAL.] By ROBERT E. CARR,
President.

Attest:

R. R. McCORMICK,
Sec'y Denver Pacific R'y & Tel. Co.

JOHN P. USHER,
C. E. BRETHERTON,
Attorneys for Petitioner.
HENRY BEARD,
Of Counsel.

STATE OF MISSOURI,
Eastern District of Missouri, ss:

Robert E. Carr, of the city of S't Louis, being duly sworn, on his oath says:

I. I am president of the Denver Pacific Railway and Telegraph Company, the claimant in the foregoing petition named.

II. No assignment or transfer of the claim set forth in said petition, or any part thereof, or any interest therein, has been made at any time.

III. Said Denver Pacific Railway and Telegraph Company is justly entitled to the amount in said petition claimed from the United States, after allowing all just credits and offsets.

IV. I believe the facts as stated in said petition are true.

ROBERT E. CARR.

Subscribed & sworn to before me this 26th day of January, 1876.
Witness my hand & seal, using a scroll therefor.

T. D. TOWNSEND, [SEAL.]
United States Commissioner, Eastern District of Missouri.

8 Post-office address of claimant: Denver Pacific Railway and Telegraph Co., Denver, Colorado.

Post-office address of claimant's attorneys: John P. Usher, C. E. Bretherton, Lawrence, Kansas.

9 EXHIBIT A.

The United States to the Denver Pacific Railway & Telegraph Co., Dr.

A.—AMOUNT DUE FOR MAIL SERVICE.

1873.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles, at $150 per mile per annum	$3,975 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $150 per mile per annum	3,975 00
July 1 to Sept. 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
October 1 to Dec. 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00

1874.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
July 1 to Sept. 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00

October 1 to Dec. 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
	$38,160 00
Less fares paid by special agents	40 00
	$38,120 00

1875.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	$5,035 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
July 1 to Sept. 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
October 1 to Dec. 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
	$58,260 00

10 EXHIBIT B.

An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be, and it hereby is authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

SECTION 2. And be it further enacted, That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Rail-
11 way Company, Eastern Division, but nothing herein shall authorize the said Eastern Division Company to operate the road or fix

the rates of tariff for the Denver Pacific Railway and telegraph Company.

SECTION. 3. And be it further enacted, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: Provided, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this act.

Approved March 3, 1869.

EXHIBIT C.

Articles of agreement entered into this 19th day of March, A. D. 1869, between the Union Pacific Railway Company, E. D., party of the first part, and the Denver Pacific Railway and Telegraph Company, party of the second part, witnesseth:

Whereas, by the act of Congress, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, E. D., between Denver and the point of its connection with the Union Pacific Railroad, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado," approved March 3d, 1869, it is among the things provided that the said Union Pacific Railway Company, E. D., may contract with the Denver Pacific Railway and Telegraph Company for the construction, operation and maintenance of that part of its line of railroad
12 and telegraph between Denver City and its point of connection with the Union Pacific Railroad at Cheyenne, and to adopt the line of road already graded by said Denver Pacific Railway and Telegraph Company, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges of the said Union Pacific Railway Company, E. D., between Denver and Cheyenne aforesaid, subject to all the obligations pertaining to said part of the line:

Now, therefore, it is agreed that the said party of the first part has for its line of road, by consent of the party of the second part, adopted the line of road already located and graded by the party of the second part, and by virtue of the power and authority contained in the said recited act of Congress, approved March 3d, 1869, in strict accordance with its provisions, and subject to the duties, obligations, conditions and limitations imposed by said act and the other acts of Congress relating to the Union Pacific Railroad and its branches, and upon condition that the Denver Pacific Railway and Telegraph Company, party of the second part, shall and will in all things well and truly perform, observe and keep all the duties and obligations to be performed, observed and kept by the party of the first part in respect to the construction and operation of this part of the line of road of the party of the first part, and upon like condition, the grant and transfer of rights are hereinafter made, the said The Union Pacific Railway Company, E. D., party of the first part, has and does hereby give, grant, transfer and assign to the said Denver Pacific Railway and Telegraph Company, party of the second part, the perpetual use of its right of way and depot grounds be-

tween Denver and Cheyenne, together with all the rights and privileges of the said party of the first part, to construct and operate its railroad from Denver to Cheyenne aforesaid; also all the lands and rights to lands appertaining to the said line of road between Denver and Cheyenne, granted by Congress in aid of the building of said line of road, subject to the charges and expense of obtaining patents for the same.

13 And the said Denver and Pacific Railway and Telegraph Company, in consideration of the premises and of said grant and transfer, hereby agrees to and with the Union Pacific Railway Company, E. D., to construct and operate said railroad and telegraph line between the points aforesaid, upon the adopted line hereinbefore mentioned between the points aforesaid, in all respects as required by said act of Congress of March 3d, 1869, and as required and contemplated by the several acts of Congress relating to the Union Pacific Railroad and its branches, and to connect with the railroad and telegraph of the party of the first part, and of the Union Pacific Railroad Company as required and contemplated by said acts of Congress, and according to the true intent and meaning thereof, and the said party of the second part agrees to fully complete and equip said road by the first day of January, 1871, in default whereof the party of the first part may enter upon and construct the same, paying said party of the second part an equitable price for their outlays thereon.

In testimony whereof, the parties have caused their seals to be hereunto affixed, and these presents to be signed in duplicate by their presidents and attested by their secretaries.

THE UNION PACIFIC RAILWAY CO., E. D.,
[SEAL.] By JOHN D. PERRY,
President.

Attest:
CHAS. B. LAMBORN,
Secretary.

DENVER PACIFIC RAILWAY & TELEGRAPH CO.,
[SEAL.] By JOHN EVANS,
President.

Attest:
R. R. MCCORMICK,
Secretary.

14 EXHIBIT D.

DEPARTMENT OF JUSTICE,
Washington, D. C., Nov. 11th, 1875.

Hon. MARSHALL JEWELL,
Postmaster-General:

SIR: I have the honor to acknowledge the receipt of your letter dated the 9th inst., presenting the claim of the Denver Pacific Railway and Telegraph Company to compensation for transmission of the mails. In reply to your inquiry as to the propriety of your department withholding from the Denver Pacific Railway and Telegraph Company pay for postal service by reason of the bonds issued by the United States to the Eastern Division of the Union Pacific Railway Company, not being provided for by that corporation (see act of March 3, 1873, C. 226, 17 Stat. at Large, 508), I would respectfully say, that, according to the opinion heretofore given (13 Opinions, 351), it is entirely immaterial that the bonds delivered to the Eastern Division of the Union Pacific Railway Company (subse-

quently called the Kansas Pacific Railway Company) were not actually applied to the building of that particular section of road between Denver and Cheyenne; that by the act of March 3, 1869 (C. 127, § 1, 15 Stat. at Large, 324), the authority given the Denver and Pacific Railway and Telegraph Company to construct, operate, and maintain the portion of railroad aforesaid was coupled with a proviso, that it should be so "subject to all the obligations pertaining to said part of its (the Union Pacific) line;" one of those obligations being the transportation of the mails at reasonable rates (12 Stats. at Large, 493), the compensation to be applied to the payment of the bonds issued to aid said corporation by the United States, in the manner pointed out by the several acts of Congress upon that subject; and that the pay for such postal service is properly
15 withheld by you under the provisions of the act approved March 3, 1873 (Ch. 226, § 2, 17 Stats. at Large, 508).

The papers forwarded with your communication for my consideration are herewith returned.

Very respectfully, your obedient servant,

(Signed) EDWARDS PIERREPONT,
Attorney-General.

The following is the opinion referred to in above. (13 Opinions of Attorney-Generals, 351.)

DEPARTMENT OF JUSTICE,
December 9, 1870.

SIR: From your letter of the 22d ultimo, the following facts appear: On the 19th of November, 1870, an order was issued from the Post-Office Department to recognize the service of the Kansas Pacific Railway Company in conveying the mails at certain specified rates, "subject to fines and deductions and the provisions of the 5th section of the act approved July 2, 1864 (13 Stat., 356), which provides that one-half the pay for the mail service performed shall be applied to the payment of the bonds issued by the government in aid of the construction of the road."

Mr. Keiff, the agent of the company, claims that the order should be modified so far as it applies to the provisions of the 5th section of the act of July 2, 1864, to the service to be rendered on that part of the line of the Kansas Pacific Railway between the 394th mile-post west of the Missouri River and Denver. The ground of his claim is that the government issued no bonds to aid in the construction of that part of the road, having stopped its subsidy at or near the mile post above mentioned.

I am of the opinion that Mr. Keiff's claim is not well founded. The provision of the act of 1864, amending the act of July 1, 1862, section 6 (12 Stat., 489), is that one-half of the compensation for services
16 rendered for the government by said company shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said road. There is nothing which limits this application of the half compensation to the moneys earned on that part of the road which should be directly aided by the issue of the government's bonds.

The particular portion of the road to which the aid of the government was immediately applied is of no consequence in determining the general liability of the road. The road built by this company is a whole. Aid by the government applied to one part of it makes the company just so much the abler to build the other parts of it. The service rendered by the company to the government, in transporting mails or

otherwise, is also a whole for the purpose of this inquiry, and a restriction of the reserved compensation to the earnings on one part of the road, because the aid of the government was given directly to that part of the road, seems to me to be required neither by law nor justice.

The object of Congress in directing that bonds should be issued at the rate of so much per mile, was to prevent imposition upon the government by an issue of bonds beyond a reasonable risk.

It seems to have been the purpose of Congress that when a road is aided at all by bonds issued by the United States, one-half of what the road, in any part of it, may earn for service to the government shall be applied to the reimbursement of the United States for such aid. A diminution of the amount reimbursed in this way would merely delay the discharge of a just debt from the company to its benefactor.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

17 II.—*Traverse.*—*Filed Feb'y* 16, 1876.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of fifty-eight thousand two hundred & sixty dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

18

19 III.—*Demurrer.*—*Filed Dec'r* 22, 1876.

And the said defendants, by their Attorney-General, say that the petition is not sufficient in law.

THOMAS SIMONS,
Assistant Attorney-General.

20

21 IV.—*Opinion on demurrer.*

The following is a statement of the statutory provisions and the facts involved in the demurrer to the claimant's petition:

I. By the act of July 1, 1862 (12 Stat. L., 489), incorporating the Union Pacific Railroad Company, that company was authorized to construct a railroad from a point in the Territory of Nebraska, on the one hundredth meridian of longitude, to the western boundary of the Territory of Nevada.

II. That act made four grants to that company, namely: 1. Of the

right of way over the public lands. 2. Of the right to take from the adjacent public lands earth, stone, timber, and other materials for the construction of the road. 3. Of alternate sections of the public lands along the line of the road expressed to be granted "for the purpose of aiding in the construction of said railroad, * * * and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon;" and, 4. Of sixteen bonds of the United States, of $1,000 each, for each mile of the said road completed and equipped by the company; which grant was expressed to be "for the purposes * * * mentioned" in the act. And in connection with this grant it was enacted that, "to secure the repayment to the United States as hereinafter provided of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States."

III. By the sixth section of the act it was declared "that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph-line in repair and use, and shall at all times transmit dispatches over said telegraph-line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation,
22 not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid." By the fifth section of the act of July 2, 1864 (13 Stat. L., 356), it was provided that only one-half of the compensation for services rendered for the government by the companies named in the act of 1862 should be required to be applied to the payment of the bonds issued by the government to those companies.

IV. Further to provide for the eventual payment by the company of the bonds issued to it, the act required that, "after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

V. By the said act of 1862 the Leavenworth, Pawnee and Western Railroad Company was authorized to construct a railroad from the mouth of the Kansas River to the initial point of the Union Pacific Railroad, on the one hundredth meridian of longitude, "upon the same terms and conditions, in all respects, as are provided in this act for the construction" of the Union Pacific Railroad. The distance from the mouth of Kansas River to the initial point aforesaid was $393\frac{15}{16}$ miles.

VI. By the terms of the second proviso in section 9 of the act of July

2, 1864 (13 Stat. L., 356), amendatory of that of July 1, 1862, any company authorized to construct its road from the Missouri River to the initial point aforesaid, was authorized to construct its road so as to connect with the Union Pacific Railroad at any point westwardly of the initial point aforesaid; and in connection with this authority it was enacted that "in aid of the construction of so much of its road * * * as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and be subject to all the conditions and restrictions of this act: Provided, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."

VII. The act of July 2, 1864, further authorized the eastern division company to issue its first-mortgage bonds upon its road to the amount of $16,000 per mile, and declared that "the lien of the United States bonds shall be subordinate to that of the bonds" of said company, thereby authorized to be issued, "except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States." Those provisions are shown above in paragraph III.

VIII. An act further amendatory of the act of 1862 was passed July 3, 1866 (14 Stat. L., 79), authorizing the eastern division company to designate the general route of its road, and to file a map thereof, at any time before December 1, 1866; and enacting that, "upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: Provided, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad * * * as they would have been entitled to if they had connected their said line with the Union Pacific Railroad on the one hundredth degree of longitude, as now required by law: And provided fur-
23 her, That said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

IX. The petition alleges that on the 3d of March, 1869, the Kansas Pacific Railway Company (meaning thereby the Union Pacific Railway Company, eastern division, by its present name) had completed a line of railroad to Sheridan, a distance of 440 miles from the Missouri River and 225 miles from Denver, and had received from the United States bonds to the amount of $6,303,000, being at the rate of $16,000 per mile for 393$\frac{3}{16}$ miles, and all that that company was entitled to.

X. At the last-named date the claimant was engaged in constructing a railroad from Denver to Cheyenne, in Wyoming Territory, a distance of 106 miles, but had no aid from the government, either in lands or bonds. The act of March 3, 1869 (15 Stat. L., 324), was then passed in the following terms:

"SEC. 1. That the Union Pacific Railway Company, eastern division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver

City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot-grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

"SEC. 2. That the said Union Pacific Railway Company, eastern division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connection, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, eastern division; but nothing herein shall authorize the said eastern division company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

"SEC. 3. That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, eastern division: *Provided*, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act."

XI. In pursuance of the authority given by this act, a contract in conformity therewith was entered into between the two companies therein named, and the eastern division company completed its road from the mouth of Kansas River to Denver, and the claimant completed its road from Denver to Cheyenne, and received the grant of alternate sections of land along its line, under the assignment from the former company.

24 XII. On the 3d of March, 1873, an act was passed (17 Stat. L., 508) whereby the Secretary of the Treasury was "directed to withhold all payments to any railroad company, and its assigns, on account of freights and transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the 5 per cent. of net earnings due and unapplied as provided by law." By the same section, "any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States upon the merits of all the points presented by it in answer thereto."

XIII. Previous to the year 1873, and during the whole of the years 1873, 1874, and 1875, the claimant transported over its road the mails of the United States, and for the transportation thereof prior to 1873 was paid in full, but since the beginning of that year the government has refused to pay anything for such transportation.

NOTT, J., delivered the opinion of the court:

This is an action brought by the Denver Pacific Railway to recover for services rendered in carrying the defendants' mails from Denver to Cheyenne. The defendants have demurred to the petition, but it is conceded by their counsel, the Assistant Attorney-General, that the claimants are entitled to recover a portion of their demand, and hence that the demurrer must be overruled. The resulting question, elaborately argued on the hearing, is as to the amount for which judgment should be entered, it being mutually conceded that the petition presents fairly the law and the facts involved in the case.

The position which the defendants occupied on the argument, briefly stated, is this: (1) That no privity of contract exists between them and the claimants. (2) That the claimants are nothing more than the assignees or successors pro hac vice of the Kansas Pacific Railroad. (3) That the government may withhold one-half of the freight-moneys earned by the claimants in carrying the mails, as if the service had been performed by their assignors, the Kansas Pacific Railroad, and may apply the money thus withheld to the payment of the bonds issued in aid of the construction of that road. (See the Pacific Railroad acts 1862, 1864, 12 Stat. L., p. 489, §§ 5, 6, 9; 13 Stat. L., p. 356, § 5.)

It was determined by the decision of the Supreme Court in the Union Pacific Railroad Case (11 C. Cls. R., p. 1) that this half of the earnings of these roads, which the government is authorized to withhold, is not a condition attached to the franchise, nor yet an obligation springing out of the land-grants conferred upon the companies, but simply a specific mode of payment upon the mortgage which the Pacific Railroad act, 1862 (12 Stat. L., p. 489, §§ 5, 6), created. In the work of construing the uncertain statutes brought before us by this suit, that much may be taken as settled. Whatever words of obligation they contain referring to the subject-matter of this controversy must be taken as restricted to the subject-matter of the statutory mortgage. The vital question, and, indeed, the only question now to be determined is, whether the property of the Denver Pacific Railway was acquired and taken subject to the incumbrance or mortgage which rests upon the Kansas Pacific Road. That inquiry involves a brief review of the statutory history of both roads.

The Pacific Railroad act, 1862 (12 Stat. L., p. 489, §§ 5, 9), authorized a loan of government bonds to the Kansas and Pacific Railroad (then known as the Leavenworth, Pawnee and Western Railroad Company), and at the same time imposed upon the road as security for such advances a statutory mortgage. The loan authorized by the act was not of an amount in gross, but was to be dependent upon the length of the road, the advances being limited to $16,000 a mile, and made as sections of twenty miles were completed. (Amendatory act, 1864, 13 Stat. L., p. 356, § 10.) It was therefore essential to the security of the government that some limitation be set upon the length of the route; and accordingly it was provided that the projected railway, starting from an eastern terminus at the mouth of the Kansas River, should end by connecting with the Union Pacific Railroad at the one hundredth meridian. The act contemplated, on the one hand, that every mile of this road should be aided by the loan, and provided, on the other, that the delivery of the bonds to the company should "ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued." (Act 1862, 12 Stat. L., p. 489, § 5.)

But before the work of construction began it was discovered that the point where the one hundredth meridian would intersect the Union Pacific Railroad would not form a desirable junction for the branch roads that were to diverge from the main or trunk line. Accordingly, by a general provision in the amendment act, 1864 (13 Stat. L., p. 356, § 9), these companies were authorized to connect their roads with the Union Pacific "at any point westwardly of such initial point," the loan, nevertheless, being restricted to the same amount which the roads would have been entitled to receive in bonds if they had connected at the one hundredth meridian. And by the amendment act, 1866 (14 Stat. L., p. 79, § 1), a similar provision was enacted, which specially authorized the Kansas Pacific Railroad (then known as the Union Pacific Railroad, eastern division) to extend their line to a point of junction not "more than fifty miles westwardly from the meridian of Denver"; but, nevertheless, with the same restriction, that the amount of bonds "to aid in the construction of their line" should be no greater than "they would have been entitled to if they had connected their said line with the Union Pacific Railroad at the one hundredth degree."

Here it may be noted that the length of the original route from the mouth of the Kansas to the one hundredth meridian, for which bonds were subsequently issued, is 394 miles; that the length of the road constructed by the Kansas Pacific Company from the mouth of the Kansas to Denver is 665 miles; that the length of the remaining link of road constructed by the claimants, from Denver to the intersecting point at Cheyenne, is 106 miles; and that the amount of the mortgage on the bonds advanced to the Kansas Pacific Company is $6,303,000. In other words, a route of 771 miles of road has been constructed, and the government loan has contributed to 394 miles thereof.

So far the rights and equities of the government as mortgagee remained unimpaired by legislation. The terms of the mortgage continued unchanged; the amount of the loan was not enlarged; the security pledged by the mortgage was considerably augmented. At the same time there was nothing in either of the statutes to prevent the Kansas Pacific Company from transferring the whole or a portion of their projected road to third parties, subject, of course, to the operation of the mortgage. Unquestionably the Kansas Pacific Company could not have shaken off by any act of their own the incumbrance from any portion of their property, and a purchaser of the equity of redemption would
26 have been no better off than the mortgagor, save, perhaps, in the remote equitable right of having the grantor's residue of the property first exhausted if the mortgage should be brought to a foreclosure. The point, therefore, to be determined is whether Congress by any subsequent act have severed the franchise of the Kansas Company, and permitted the claimants to construct this portion of the line unincumbered by the prior mortgage that otherwise would have attached.

That point necessarily depends upon the construction which should be given to a single statute, the Transfer Act, 3d March, 1869 (15 Stat. L., p. 324). But, for the better interpretation thereof, the circumstances existing at the time of its enactment should be understood.

In the first place, the Pacific Railroad acts relate to three distinct subject-matters: 1. To the incorporation of the companies with the obligations and conditions imposed upon the franchise. 2. To certain grants of portions of the public lands, intended as a gift, or bonus, conforming with the policy known as the land-grant railroad system. 3. To the loan of government bonds to aid in the construction of the roads and the statutory mortgage therefor which have already been described.

In the second place, the Kansas Pacific Company had then constructed their road to Sheridan, a distance of 440 miles from its eastern terminus, and had received all of the government loan which they would ever be entitled to receive. But they had remaining unconstructed a line of 225 miles from Sheridan to Denver, and of 106 miles from Denver to Cheyenne, or some other point of junction with the Union Pacific Road.

In the third place, the Denver Pacific Company had acquired a right of way from Denver to Cheyenne, presumably under the acts 4th August, 1852 (10 Stat. L., p. 28), 3d March, 1855 (id., p. 683), and 15th July, 1862 (12 id., 577), and had partially constructed this road-bed without a land-grant and without a government loan. Conversely, they had not assumed any of the obligations imposed by the Pacific Railroad acts nor was their franchise restricted by any of those conditions.

The transfer act, 1869 (15 Stat. L., p. 324), now to be construed, is in these words:

"An act to authorize the transfer of lands granted to the Union Pacific Railway Company, eastern division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado.

"SEC. 1. That the Union Pacific Railway Company, eastern division, be, and it hereby is, authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot-grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.

"SEC. 2. That the said Union Pacific Railway Company, eastern division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated, and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad
27 and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railroad Company, eastern division; but nothing herein shall authorize the said eastern division company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

"SEC. 3. That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, eastern division: Provided, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under the provisions of this act."

As to the construction which should be given to this statute a majority of the court have reached the following conclusions:

1. The controlling purpose of the statute was to exempt the Kansas Pacific Company from building a competing road between Denver and Cheyenne and to enable the Denver Pacific Company to participate in the land-grants which had been assured to all of the companies engaged in the enterprise of building the Pacific roads, and at the same time to secure to the government or to the public the continuous lines of railway which the Pacific Railroad acts contemplated. A secondary purpose, which, from the nature of things, would have defeated the controlling purpose of the statute, should not be ascribed to Congress. To compel a road of 106 miles in length to become liable for the mortgage indebtedness of 394 miles of another road at $16,000 per mile, and, moreover, to compel it to contribute immediately from its earnings toward paying the interest on the mortgage-debt, seems to us such an inconsistent purpose. Congress, we think, could not have intended by mere implication to have continued a condition that would have defeated the end which all parties had in view.

2. Express words of relinquishment were not necessary in the statute as if there had been a thing in esse actually bound and incumbered by the statutory mortgage. It had been created ipso facto by the issue of the bonds (Pacific Railroad act, 1862, § 5), and doubtless was intended to operate prospectively so as to embrace property subsequently acquired, such as, ex. gr., the rolling stock; but, nevertheless, as a matter of fact, when the Transfer act passed, the mortgage was not resting upon any of the property now possessed by the Denver Company. The mortgagors had not acquired title to the public lands west of Denver, they had not constructed a railroad there, nor did they possess anything beyond their franchise. The thing transferred was their naked right to acquire property to which the mortgage might attach, and not property already possessed and incumbered. Amid such circumstances it seems to us that if Congress, when consenting to the transfer of the right, had intended that the thing subsequently to be acquired under it should be bound for a specific debt of the grantors, the intent would have been clearly expressed in the statute.

3. The vital words of the statute, "to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its (the
28 Kansas Pacific Company's) right of way and depot-grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line," (§ 1,) do not necessarily imply that the "grant" was to be taken subject to the debts of the grantor; for, in the first place, the term "obligations" does not necessarily relate to the mortgage, inasmuch as an obligation to pay does not ipso facto spring out of an incumbrance or mortgage; and, in the second place, the term is abundantly satisfied by the obligations which were personal, i. e., not running with the land, but growing out of and relating to the franchise and corporate duties of the Kansas Pacific Company; and, in the third place, the provision is expressly limited and confined to obligations "pertaining to said part of its line." To say that obligations pertaining to a specific portion of the Kansas Pacific Company's line should be construed to read (in the language of the Pacific Railroad act, 1862, § 5), the mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description;" or that "obligations pertaining" to this portion of the line should be construed to mean participation in the payment of a debt incurred on a distinct and different portion of the line, seems to us a forced and artificial con-

struction, foreign to the plain purpose of the act. No "obligation" to contribute to a special fund for the payment of a specific mortgage-debt of the other company antecedently rested on the Denver Company; and none would be implied generally at law unless the grant had been in terms made subject to the mortgage. What the Denver Company are required by the statute to assume are those things which the Kansas Company were required by law to do pertaining, relating, belonging exclusively to this portion of the line, and not those things which appertained, related, or belonged generally to the whole of their line. In our view of the statute, the "obligations pertaining" to that part of the line which was to be transferred to the Denver Pacific Company were corporate obligations—to complete the road, to equip it, to operate it, and to transport the government mails and supplies at fair and reasonable rates, not exceeding the rates paid by private parties for the same kind of service.

4. The second section of the Transfer act appears to us to be in harmony with the construction which we have given to the first. It manifestly relates to those provisions of the Pacific Railroad acts which require the different companies forming the system, while continuing distinct and independent corporations, nevertheless to unite in forming a continuous line. The purpose of the section manifestly was to make the Denver Road a link in the chain, but yet to leave it free from all dictation on the part of the Kansas Company. If it had been intended that the former company should immediately contribute toward the payment of the debt of the latter, some provision would have been necessary for an adjustment and settlement of the accounts between the companies, or some declaration to the effect that the Denver Company should have no right of action over against the other. Standing in the position which the United States have seen fit to occupy toward these roads, it manifestly was for their interest that no such complications should arise, and that every member of the system should have clearly-defined rights and responsibilities, and that the enterprise both as a whole and in each of its corporate parts should be crowned with success.

5. In like manner, the third section of the Transfer Act appears inconsistent with the liability which the defendants now seek to throw upon the Denver Company. The Amendment Act, 1864, provided for and contemplated two mortgages upon the roads. The first of these was to be in favor of third persons for $16,000 a mile, and the second, the
29 statutory mortgage in favor of the government, also for $16,000 a mile, making the aggregate of the incumbrances $32,000 a mile. The transfer act adopts the same limitation, authorizing the Denver company to mortgage their road "for an amount not exceeding $32,000 per mile." It does not seem possible that Congress could have intended in a vague and roundabout way to diminish the mortgage on the Kansas road by shifting practically a proportionate part of the debt to the Denver company, nor to have imposed upon the Denver company a mortgage which would practically amount to more than $8,000 a mile in excess of the $32,000 a mile expressly designated by the statute as the limit of their mortgage incumbrances.

6. It must also be noted that if the transfer act was intended to make the franchise and property of the Denver company subject to the mortgage of the Kansas company, it will not only give to the government the right of withholding from the former company one-half of such moneys as may be owing to them for mail-transportation, but will also compel them to apply "at least five per centum of the net earnings" of their road upon this indebtedness of the other company (act 1862, § 6),

for that additional source of payment is equally a condition of the mortgage. In like manner the incumbrance must be extended not only to the lands granted, but also to the rolling-stock and personal property of the company, i. e., in the words of the mortgage, "to property of every kind and description" which the claimants may possess. (Act 1862, § 5.) That such could not have been the intent of Congress we think is clear not only for the reasons before stated, but also for the reason that in the previous legislation affecting roads benefited by the loan, Congress made the grants in terms subject to the "conditions" imposed upon the Union Pacific Company (act 1862, § 9; act 1864, § 9) (a term properly referable to property and to a mortgage), while in the transfer act the term "condition" is dropped and "obligation" is substituted for it—a term not properly referable to land nor to a mortgage, but imposing personal or corporate duties upon the party obligated.

7. The acts relating to the Union Pacific Railroad and its branches contemplate a continuous line of road formed by local railroads belonging to different companies, and they thus constitute a system of enactments in pari materia which are to be construed together without reference to their dates and as one act. And the Amendment Act of 1864 (§ 7) provides as follows: "And the failure of one company to comply fully with the conditions and requirements of this act, and the act to which it is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies that shall have complied with the same."

This as it stands is a general provision relating to all the acts up to its date, and by the rules of construction it is applicable to subsequent acts in pari materia and branch roads subsequently created and forming a part of the continuous line of road. We think that, by force of the provision, the Denver Company is not liable for the mortgages or debts of the Kansas Company.

It was understood on the argument that the decision upon this demurrer would be regarded as final in this court, neither party caring to present facts which do not appear on the record; but the judgment of the court will be in the usual form, viz, that the demurrer be overruled with leave to the defendants to answer over. If no such answer be filed within thirty days the claimants may move that judgment be entered for the amount demanded in the petition or for such other amount as may be agreed upon by stipulation.

30 *Dissenting opinion by Chief Justice Drake.*

DRAKE, Ch. J., dissenting:

I do not concur in the conclusion reached by the majority of the court, and will briefly state my views of the case.

By the act of March 3, 1869, the Eastern Division Company was required to extend its railroad to a connection at Denver with the proposed road of the claimant from Denver to Cheyenne, so as to make a continuous line of railroad from Kansas City, via Denver, to Cheyenne.

To effectuate this object, the Eastern Division Company was by that act authorized to contract, and did contract, with the claimant to adopt the claimant's road-bed, already graded between Denver and Cheyenne, as its line between those points, and to transfer to the claimant "all the rights and privileges [of the Eastern Division Company in], subject to all the obligations [of that company], pertaining to said part of its line."

As a part of this arrangement, and under the authority of the third

section of that act, the claimant received the alternate sections of public lands along the line of its road, to which the Eastern Division Company would have been entitled if it had built that part of the road.

Beyond doubt, then, the claimant, by its own agreement, occupies now, as to the government, the exact position which the Eastern Division Company would now occupy if it had itself built the road from Denver to Cheyenne. In return for the acquirement of all the rights and privileges of that company in the road between those points, the claimant assumed all the obligations of that company pertaining thereto. The sole change authorized by and made under that act was in the party which should enjoy those rights and privileges and assume those obligations.

As the rights and privileges are not involved in this suit, we need only inquire into the nature and extent of the obligations which the claimant assumed. To determine this, it is only necessary to ascertain what would have been the obligations of the Eastern Division Company if it had constructed the whole line from Kansas City, via Denver, to Cheyenne. This is done by reference to the previous acts above set forth.

By the act of 1862, the Eastern Division Company (then called the Leavenworth, Pawnee and Western Railroad Company) was authorized to construct a railroad from the mouth of the Kansas River to the initial point of the Union Pacific Railroad, "upon the same terms and conditions in all respects as are provided in this act for the construction" of the Union Pacific Railroad.

Among the terms and conditions imposed by that act, primarily upon the Union Pacific Railroad Company, and secondarily, but equally, upon the Eastern Division Company, were the following: First. That the company should pay at maturity the bonds of the government issued to it in aid of the construction of its road. Second. That the company should keep its railroad and telegraph-line in repair and use. Third. Should at all times transmit dispatches over said telegraph-line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the government whenever required to do so by any department thereof. Fourth. That the government should at all times have the preference in the use of the telegraph-line and railroad for all the purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service. Fifth. That all compensation for services rendered for the government should be applied to the payment of said bonds and interest until the whole amount should be fully paid.

31 Such were the terms upon which the government made to the Eastern Division Company the grants specified in the act of 1862; and those grants were declared to be made "upon condition" that the company should do the things specified in the five particulars just stated. When the Eastern Division Company accepted those grants, it accepted also the obligation to do those things. It is no more possible to separate the grants from the obligations than it would be to impose the obligations without an acceptance of the grants.

No one of those obligations has been released by the government, nor has the government modified any of them, except in one particular, namely, that it no longer requires the whole compensation earned by the company for services to the government to be applied to the payment of said bonds and interest, but only one-half thereof.

So if the Eastern Division Company had proceeded, under the act of 1862, to construct its road from the mouth of the Kansas River to the

initial point of the Union Pacific Railroad, it would have done so subject to those obligations.

By the act of July 2, 1864, that company was authorized to adopt a new route, and to construct its road so as to connect with the Union Pacific Railroad at a point westwardly of the initial point of the latter; but that authority was expressly declared to be "subject to all the conditions and restrictions of this act." What act? Why, as the act of 1864 is amendatory of that of 1862, and therefore a part of it, and the two are to be taken and construed together as the same act, the words "this act" must be held to mean the act of 1862, as amended by that of 1864. And so the amended act affirmed and reimposed upon the Eastern Division Company the above "conditions."

With its legal obligations thus defined, the Eastern Division Company proceeded to construct its road on its new route. Had it built the whole line from Kansas City, via Denver, to Cheyenne, it cannot be doubted that that whole line would have been subject to the terms and conditions aforesaid. If so, then the part of the line between Denver and Cheyenne, built by the claimant, became, by the act of 1869, just as much subject thereto; not by arbitrary legal imposition, but by express agreement between the claimant, the government, and the Eastern Division Company. Any other view makes wholly nugatory the provisions of the acts of 1862, 1864, and 1869, imposing the terms and conditions aforesaid.

Against this view it is urged that it makes the claimant and its road liable for the bonds issued to the Eastern Division Company for the $393\frac{5}{16}$ miles, on account of which those bonds were issued. Perhaps so, perhaps not; but if so, why not? The act of 1869 did not compel or require the claimant to enter into the arrangement therein specified, but only authorized it. Nor did it impose upon the claimant against its will a liability for the obligations of another company, but merely authorized it to make a contract, the clear and inevitable result of which was to subject it to certain existing statutory obligations. The claimant availed itself of that authority, and entered into the contract with full opportunity to know, and, in fact, well knowing, what it was doing. It is too late now for it to avoid the obligations it assumed in becoming a party to that contract. If it desires to be released from them, the very least it ought in justice and equity to do is to give back to the government the lands granted by the government to it, and without which, it may be, the claimant's road would not have been built. At any rate, the terms of the laws governing the case in-

32 clude and blind the claimant, and this court has no authority to release the claimant from the obligations of its own acts under those laws.

In my judgment the claimant is entitled to recover only one-half of the sum sued for, and the defendants are entitled to withhold the other half for the purpose expressed in the act of 1862. If the Eastern Division Company—now the Kansas Pacific Railroad Company—should hereafter pay the principal and interest of the bonds issued to it, then the withheld one-half of the compensation earned by the claimant would be lawfully claimable by, and doubtless would be paid to, it.

33 V.—*Demurrer overruled.*

And now, to wit, April 16, 1877, Judge Nott read the opinion of the court, and judgment was ordered to be entered as follows: That the demurrer filed herein be overruled with leave to the defendants to answer over.

The chief justice read a dissenting opinion.

34, 35 VI.—*Traversed. Filed May* 15, 1877.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of fifty-eight thousand two hundred and sixty dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

36, 37 VII.—*Counter-claim. Filed May* 16, 1877.

And now comes the Attorney-General, on behalf of the United States, and says that the above-named claimant, before and at the time of the commencement of this suit, was and still is indebted to the defendants in a large sum of money, to wit, in the sum of $284,130, which the defendants set up as a counter-claim herein, and set forth the grounds of such defense as follows, namely: That prior to the enactment of the act of Congress, approved July 1, 1862, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," a certain corporation then known as the Leavenworth, Pawnee and Western Railroad Company, afterward called the Union Pacific Railway Company, Eastern Division, and now called the Kansas Pacific Railway Company, was organized under the laws of Territory of Kansas to construct and operate a railroad within said Territory, which corporation, its associates, successors, and assigns, under and by virtue of the act of
38 Congress aforesaid, and of sundry acts additional to and amendatory thereof, were authorized to construct a railroad and telegraph line upon the routes, in the manner, and for the purposes and upon the terms and conditions in said act and acts additional to and amendatory of said act specified, which act and acts were assented to by the said corporation, its associates, successors, and assigns, and acceptance of the conditions of said act and acts duly made and filed, as therein prescribed; and the said corporation, its associates, successors, and assigns, from the time of such authorization and assent and acceptance hitherto, have accepted, appropriated, and exercised all and singular the rights, franchises, powers, and privileges, gifts and grants, the said act and subsequent acts provided or conveyed, but subject to all the requirements and conditions thereto annexed, as in the said act and acts expressed, all of which the said corporation, its associates, successors, and assigns thereby agreed to perform, and became and are bound to fulfill.

That among other privileges, gifts, and grants the said corporation, its associates, successors, and assigns, for the purposes mentioned in said act of July 1, 1862, obtained from the defendants, for its and their

use and benefit, a grant or grants of bonds of the United States, bearing 6 per centum per annum interest, amounting to a very large sum, to wit, to the sum of $7,000,000, which were issued to the said corporation, its associates, successors, and assigns for the purpose and in the manner provided by the fifth section of said act, upon which bonds interest as aforesaid, thereafter and hitherto, has accrued to a large amount, to wit, to the amount of $5,000,000, which said amounts of said bonds and of interest accrued are as yet wholly unpaid by the said corporation, its associates, successors, and assigns, to the defendants, nor has the obligation of the said corporation, its associates, successors, and assigns, in respect of the said bonds and the said accrued interest thereon, been in any wise canceled or discharged, although the defendants have hitherto paid the annual interest on said bonds to the holders thereof at
39 the stated semi-annual periods, and although the said corporation, its associates, successors, and assigns, were and are required by the said act and acts annually, and from time to time, to apply and pay over in the manner and to the extent therein provided, and as hereinafter more particularly set forth, certain sums of money to cancel the indebtedness of the said corporation, its associates, successors, and assigns, in respect of the said bonds and accrued interest paid thereon as aforesaid, until the said bonds and interest should be fully paid.

That among the requirements and conditions upon which the last-mentioned and other grants in the said act were made and accepted by the said corporation, its associates, successors, and assigns, it is provided in the sixth section of said act as amended by the fifth section of the act of Congress approved July 2, 1864, amendatory of the said act of July 1, 1862—

That the said corporation, its associates, successors, and assigns, should apply to the payment of said bonds and interest one-half of the compensation earned by it and them, or either or any of them, for services rendered for the government in transporting mails and otherwise upon said railroad, until the whole amount of said bonds and interest is fully paid; and it is further provided in the said sixth section of said act that when the railroad which the said corporation, its associates, successors, and assigns, was therein authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy, should be completed, at least 5 per centum of the net earnings of said road should annually be applied to the payment of the bonds which by the provisions of the said act should be issued, and the interest thereon, until by such and other payments to that end said bonds and interest should be paid.

And the defendants aver that the said corporation, its associates, successors, and assigns, being organized and authorized as aforesaid, and exercising the powers and franchise aforesaid, laid out, located, constructed, and furnished the railroad and telegraph line mentioned
40 in the said act and acts, and completed the said road within the meaning and intent of the said provision of the sixth section of said act on the 1st day of June, in the year one thousand eight hundred and seventy, and have ever since maintained and enjoyed the same as a completed road, in continuous use in transporting passengers and freight for hire, and otherwise carrying on the usual business of a railroad, with the usual appurtenances of such a road; and have received during the period from the said 1st day of June to the commencement of this action, as avails of the traffic and business so carried on as aforesaid, an amount of money largely in excess of the cost of such transportation, and of all just and lawful expenditure in and for the operation of the

said railroad during the said period, so that the net earnings of the said corporation, its associates, successors, and assigns, have amounted to a very large sum annually, to wit, the sum of $3,000,000 annually.

And the defendants further aver that during each year of the said last-mentioned period it became and was the duty of the said corporation, its associates, successors, and assigns, to pay to the defendants annually, at the end of each year, 5 per centum of the net earnings aforesaid of the said railroad for the year then next preceding, amounting in each year to a large sum of money, to wit, to the sum of $150,000, to be applied to the payment of the said bonds and interest as in the said act required; yet the said corporation, its associates, successors, and assigns, have wholly neglected and refused to pay to the defendants the amount of the 5 per centum aforesaid, due in each year as aforesaid, or any part thereof, when the same became due as aforesaid, or at any time thereafter.

And the defendants aver that on or about the 23d day of July, in the year 1868, the said Kansas corporation, which was then known as the Union Pacific Railway Company, Eastern Division, having, in consideration of the several grants in said act and acts mentioned,
41 accepted and received as aforesaid, and upon the conditions aforesaid, undertaken to construct and operate a railway and telegraph line from Kansas City, in the State of Kansas, via Denver, in the State of Colorado, to a point of junction with the Union Pacific Railroad not more than fifty miles west of the meridian of Denver, entered into association with the claimant for the more certain and speedy performance of its obligations to the defendants in that behalf, in pursuance of which the said Kansas corporation, and the claimant in or about the date aforesaid, jointly made and executed an agreement whereby, in consideration among other things of the claimant undertaking to do, observe, comply with, and perform all, each, and every act, requirement, term, stipulation, proviso, and condition of all the acts of Congress then in force, or thereafter enacted, so far as should concern or relate to or affect that portion of the said railroad and telegraph line which the said Kansas corporation had undertaken to construct and operate as aforesaid, mentioned in the said agreement, namely, the portion extending from Denver, Colorado, to the point of connection aforesaid with the Union Pacific Railroad, as shown on a map of the route filed by said Kansas corporation, except as to a certain deviation of route specified in said agreement, the said Kansas corporation did assign, transfer, and quitclaim to the claimant the right to construct, own, maintain, and operate the said portion of its railroad and telegraph line, with all the rights, privileges, powers, grants, donations, and things concerning or relating to the said portion of said railroad and telegraph line and the route thereof to which the said Kansas corporation, its associates, successors, and assigns then were entitled by virtue of the act and acts of Congress aforesaid, or might thereafter become entitled by any such acts, provided, however, that the claimant might construct the said portion of said railroad on a specified route other than that laid down in the map aforesaid, and that the respective parties to said agreement should unite to secure the passage of a certain act by
42 Congress therein mentioned, and included in a Senate bill thereto annexed, and should carry out the provisions of the same if not passed.

And the defendants aver that in pursuance of the said association and agreement the said parties thereto sought and procured the passage of the act of Congress, approved March 3, 1869, entitled "An act to

authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado," and thereafter entered into the articles of agreement of March 19, 1869, set forth in the petition.

And the defendants aver that from July 23, 1868, hitherto the claimant has been associated with the said Kansas corporation under the act and acts hereinbefore mentioned in the construction and operation of the railroad and telegraph line aforesaid, sharing the gifts, grants, rights, privileges, and franchises in said act and acts, and in the said act of March 3, 1869, bestowed in consideration thereof, and subject to all the conditions and requirements thereto in the said several acts annexed; and that as to the portion of said road mentioned in said agreement of July 23, 1868, and the said act of Congress and agreement subsequent thereto, the claimant by said first-mentioned agreement became, as between the parties thereto, the assign of the Kansas corporation as to the rights, grants, and privileges therein mentioned, subject, however, then and at all times hitherto, to each and every condition and obligation in the said act and acts of Congress hereinbefore mentioned, prescribed, and imposed on the said Kansas corporation, its associates, successors, and assigns; and also that as to the said portion of the railroad and telegraph line of the said Kansas corporation mentioned in the said act of March 3, 1869, the claimant, by the said agreement of March 19,
43 1869, succeeded to the rights, grants, and privileges of the said Kansas corporation pertaining to the said last-mentioned part of its line, subject, however, then and at all times hitherto to each and every condition and obligation pertaining thereto in the said act and acts of Congress, and in the act of March 3, 1869, mentioned, prescribed, and imposed on the said Kansas corporation, its associates, successors, and assigns.

And the defendants aver that under and by virtue of the several acts aforesaid, the claimant, as the associate, successor, and assign of the said Kansas corporation as aforesaid, is bound to pay a ratable proportion of the said bonds issued as aforesaid at maturity, to wit, the sum of $1,000,000 of said bonds, and of the interest due and payable and already paid by defendants as aforesaid, to wit, the sum of $715,000, and was and is bound to apply to the payment of such ratable proportion of said bonds, and of the interest thereon already paid by the defendants as aforesaid, one-half of the compensation claimed herein as for services rendered to the defendants for transportation of the mails set forth in the petition, to wit, the sum of $29,130, and also one-half of the compensation heretofore paid over to the claimant for other services rendered to the defendants from June 1, 1870, to February 8, 1876, on the said portion (namely, from Denver to Cheyenne) of the said railroad and telegraph line, amounting to a large sum, to wit, $150,000; but the claimant has hitherto neglected and refused to apply the same, or any part thereof, as required as aforesaid; and the claimant from the date of the completion on June 1, 1870, of the said portion of said road from Denver to Cheyenne hitherto has had net earnings derived from the operation of said portion of said road to a large amount annually, to wit, $350,000 annually, and was bound to pay at least 5 per centum of the said amount of net earnings of said portion of the said railroad and telegraph line annually to the defendants, amounting to a large sum annually, to wit, $17,500, and to a large sum in the aggregate, to wit,
44 $105,000, to be applied to the payment of the ratable proportion

of said bonds and interest due from the claimant as aforesaid; but the claimant has hitherto neglected and refused to pay to the defendants the same or any part thereof.

Wherefore, the defendants ask judgment against the claimant for the several sums before mentioned which are still due and unpaid, amounting in the aggregate to the sum of $284,130.

THOMAS SIMONS,
Assistant Attorney-General.

45 VIII.—*Replication and answer to counter claim.—Filed May 16, 1877.*

Now comes the claimant by its attorney, John P. Usher, and joins issue with the defendant on its plea filed May 15, 1877, in bar of this action, and avers that the matters and things alleged in the petition herein filed are true. And for answer to the counter claim herein filed by the defendant, the claimant says:

That it was not, at the time of filing its petition herein, and is not, indebted to said defendant in the sum of $284,130, or in any part of said sum of money, which said defendant sets up as a counter claim herein.

As to the statement in said counter claim that the corporation known as the Leavenworth, Pawnee and Western Railroad Company, now called the Kansas Pacific Railway Company, was organized under the laws of the Territory of Kansas to construct a railroad within said Territory, and that said corporation was authorized by the acts of Congress of July 1, 1862, and July 2, 1864, in said counter claim mentioned, to construct a railroad and telegraph line on the routes, and in the manner and
46 for the purposes and upon the terms and conditions in said acts and other acts of Congress amendatory of said acts, and that said corporation has accepted the provisions of said acts and received the benefits in said acts conferred, subject to the requirements and conditions in said acts expressed, the claimant is not advised and cannot reply thereto.

And as to so much of said counter claim as alleges that said corporation, its associates, successors, and assigns obtained from the defendant for its and their use and benefit, bonds of the United States bearing 6 per centum per annum interest to the amount of $7,000,000, upon which said bonds there has accrued a large amount of interest, which said bonds and interest have not hitherto been cancelled or discharged, and that said corporation, its successors, and assigns undertook to pay certain sums of money to cancel the said indebtedness of said corporation, the claimant is not advised and cannot answer any further than is stated in the petition in this cause.

As to the allegation in said counter claim that said corporation, its associates, successors, and assigns, by the requirements and conditions of said acts of Congress, should apply to the payment of said bonds and interest one-half of the compensation earned by it and them, or either of them, for services rendered the government in transporting mails, and otherwise, until the whole amount of said bonds and interest is fully paid—as to this the claimant is not informed, and therefore cannot reply.

As to the allegation that said corporation, its associates, successors, and assigns, on the completion of its railroad, was under obligation to pay at least 5 per centum of the net earnings of said railroad annually, to be applied to the payment of said bonds and interest, the complainant is not informed and cannot reply.

47 As to the allegation that said corporation, its associates, successors, and assigns completed its said railroad on the first day of June, 1870, and has since that time maintained the same in continuous use, and that the net earnings from such continuous use have amounted to a large sum, to wit, $3,000,000 annually, the complainant is not advised and cannot reply.

As to the allegations in said counter claim that the said corporation, its associates, successors, and assigns, was under obligation to pay to the defendant the sum of $150,000 per annum on account of such 5 per centum, the claimant is not advised and cannot reply.

As to the allegation in said counter claim that the claimant on or about the 23d July, 1868, entered into association with the said Kansas Pacific Railway Company for the more speedy and certain performance of the obligations of the said Kansas corporation to the defendant, or any part of said obligations, the said claimant denies that it entered into any association for said purpose.

Said claimant admits that under and in pursuance of an act of Congress approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railroad to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado," it entered into articles of agreement, dated March 19, 1869, with the said Kansas Pacific Railway Company in manner and form as exhibited in the petition in this cause.

The claimant denies that it has been associated with the Kansas Pacific Railway Company in the construction and operation of the railroad and telegraph line of said Kansas corporation, or any part thereof.

The claimant denies that by the assignment of March 19, 1869, above mentioned, it became liable, or undertook in any manner or form, to pay the *the* indebtedness of the Kansas Pacific Company to the defendant.

47½ The claimant denies that is is bound or has promised to pay a ratable proportion of the bonds hereinbefore mentioned (to wit, the sum of $1,000,000 of said bonds), or to pay the interest which has accrued or may hereafter accrue upon said bonds, as alleged in said counter claim.

The claimant denies that it was or is bound to apply to the payment of such ratable proportion of bonds and interest thereon one-half of the compensation claimed in this cause, as for services rendered to the United States for transportation of the mails, as set forth in the petition.

The claimant denies that it is under obligation or has promised to pay the sum of $29,030, as alleged in said counter claim, and denies also that it is under obligation or has promised to repay to the United States one-half the compensation heretofore paid over to the claimant for services rendered to the defendant between June 1st, 1870, and February 8th, 1876, on the railroad and telegraph line of the claimant.

The claimant denies that it is under obligation or has promised to pay to the United States the sum of $150,000, as alleged in said counter claim.

The claimant also denies that its railroad from Denver to Cheyenne has had net earnings derived from the operation thereof annually to a large amount, to wit, $350,000 annually; denies that it was at the time of the filing of its petition, or has since become, bound to pay 5 per centum of its net earnings on its said railroad and telegraph line to the defendant, as alleged in said counter claim; and further denies that it

is under obligation or has promised to pay the sum of $17,500 annually to the defendant since the first of June, 1870, amounting to $105,000.

And the claimant denies that the above-mentioned moneys, or any part thereof, are due from the claimant to the United States; and denies that it is under obligation to apply any of its earnings to the pay-
47½ ment of the bonds and interest which may be due or become due to the United States from the Kansas Pacific Railway Company by reason of the delivery to said Kansas company of $6,303,000 in bonds of the United States, as set forth in paragraph 5 of the petition herein.

The claimant therefore prays judgment against the defendant for the sum of $58,260, as stated in the petition herein, together with its costs.

J. P. USHER,
Pl'ff's Attorney.

STATE OF KANSAS,
County of Salina, ss:

D. M. Edgerton, being duly sworn, says that he is the president of the railroad company, claimant in the above-entitled suit; that the foregoing replication and answer of claimant to counter claim is true.

D. M. EDGERTON.

Subscribed and sworn to before me this 9th day of November, A. D. 1877.

In witness whereof I have set my hand and official seal this ninth day of November, A. D. 1877.

[L. S.]

E. W. BLAIR,
Notary Public.

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49 IX. *Findings of fact and conclusions of law.—Filed June* 3, 1878.

This case having been heard before the Court of Claims, the court, upon the pleadings and upon the evidence, finds the facts to be as follows:

I. The Denver Pacific Railway and Telegraph Company is a corporation, duly incorporated under the laws of the Territory of Colorado.

II. The Kansas Pacific Railway Company is a corporation duly incorporated by an act of the legislature of the Territory of Kansas, passed in the year 1855, and entitled "An act to incorporate the Leavenworth, Pawnee and Western Railroad Company."

III. The name of said corporation has since been legally changed, first to the "Union Pacific Railway Company, Eastern Division," and then to the "Kansas Pacific Railway Company."

IV. On March 3, 1869, said Kansas Pacific Railway Company had completed its road to Sheridan, a distance of 404 miles from the Missouri River and 235 miles from Denver, and had previously thereto received from the United States $6,303,000 in bonds, being the number of bonds it would have been entitled to if it had connected with the Union Pacific Railroad on the one hundredth meridian, namely, at the rate of $16,000 per mile on 393$\frac{15}{16}$ miles of its road westward from the Missouri River, and which was the entire pecuniary aid to which it was entitled.

V. On the 19th March, 1869, the Kansas Pacific Railway Company, in pursuance of an act approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the

Territory of Colorado," contracted with the Denver Pacific Railway and Telegraph Company for the construction, operation, and maintenance of its line from Denver to its point of connection with the Union Pacific Railroad at Cheyenne, and granted and transferred to it all the rights and privileges subject to the obligations pertaining to that part of its road, of which said contract and grant the following is a copy:

50 "Articles of agreement entered into this 19th day of March, A. D. 1869, between the Union Pacific Railway Company, E. D., party of the first part, and the Denver Pacific Railway and Telegraph Company, party of the second part, witnesseth:

"Whereas by the act of Congress entitled 'An act to authorize the transfer of lands granted to the Union Pacific Railway Company, E. D., between Denver and the point of its connection with the Union Pacific Railroad, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado,' approved March 3, 1869, it is, among the things, provided that the said Union Pacific Railway Company, E. D., may contract with the Denver Pacific Railway and Telegraph Company for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad at Cheyenne, and to adopt the line of road already graded by said Denver Pacific Railway and Telegraph Company, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot-grounds, and to transfer to it all the rights and privileges of the said Union Pacific Railway Company, E. D., between Denver and Cheyenne aforesaid, subject to all the obligations pertaining to said part of the line:

"Now, therefore, it is agreed that the said party of the first part has for its line of road, by consent of the party of the second part, adopted the line of road already located and graded by the party of the second part, and by virtue of the power and authority contained in the said recited act of Congress, approved March 3, 1869, in strict accordance with its provisions, and subject to the duties, obligations, conditions, and limitations imposed by said act and the other acts of Congress relating to the Union Pacific Railroad and its branches, and upon condition that the Denver Pacific Railway and Telegraph Company, party of the second part, shall and will in all things well and truly perform, observe, and keep all the duties and obligations to be performed, observed, and kept by the party of the first part in respect to the construction and operation of this part of the line of road of the party of the first part, and upon like condition, the grant and transfer of rights are hereinafter made, the said The Union Pacific Railway Company, E. D., party of the first part, has, and does hereby give, grant, transfer, and assign to the said Denver Pacific Railway and Telegraph Company, party of the second part, the perpetual use of its right of way and depot-grounds between Denver and Cheyenne, together with all the rights and privileges of the said party of the first part, to construct and operate its railroad from Denver to Cheyenne aforesaid; also all the lands and rights to lands appertaining to the said line of road between Denver and Cheyenne, granted by Congress in aid of the building of said line of road, subject to the charges and expense of obtaining patents for the same.

"And the said Denver Pacific Railway and Telegraph Company, in consideration of the premises and of said grant and transfer, hereby agrees to and with the Union Pacific Railway Company, E. D., to con-

struct and operate said railroad and telegraph line between the points aforesaid, upon the adopted line hereinbefore mentioned between the points aforesaid, in all respects as required by said act of Congress of March 3, 1869, and as required and contemplated by the several acts of Congress relating to the Union Pacific Railroad and its branches, and to connect with the railroad and telegraph of the party of the first part,
and of the Union Pacific Railroad Company, as required and con-
51 templated by said acts of Congress, and according to the true intent
and meaning thereof, and the said party of the second part agrees to fully complete and equip said road by the 1st day of January, 1871, in default whereof the party of the first part may enter upon and construct the same, paying said party of the second part an equitable price for their outlays thereon.

"In testimony whereof the parties have caused their seals to be hereunto affixed and these presents to be signed in duplicate by their presidents and attested by their secretaries.

"THE UNION PACIFIC RAILWAY CO., E. D.,
"By JOHN D. PERRY, *President.*

[SEAL.]

"Attest:

"CHAS. B. LAMBORN, *Secretary.*

"DENVER PACIFIC RAILWAY & TELEGRAPH CO.,
"By JOHN EVANS, *President.*

[SEAL.]

"Attest:

"R. R. MCCORMICK, *Secretary.*"

VI. The Kansas Pacific Railway Company, in pursuance of said last-mentioned act, proceeded to complete its railroad from Kansas City, connecting there with the Missouri Pacific Railroad to Denver, connecting there with the line of said Denver Pacific Railway and Telegraph Company, and completed same in August, 1870, and the Denver Pacific Railway and Telegraph Company mortgaged its road from Denver to Cheyenne for the sum of $2,500,000 to enable it to borrow money to construct the same, and issued and sold its bonds secured by said mortgage, and with the funds so obtained constructed its railroad from Denver to Cheyenne, in the Territory of Wyoming, and completed same on or about July 1, 1870.

VII. By virtue of various acts of Congress, and of said contract and grant, the rights, powers, donations, grants of lands, rights of way, privileges, and franchises granted to the Kansas Pacific Railway Company for the construction of that portion of its line between Denver and Cheyenne became vested in said Denver Pacific Railway and Telegraph Company, as assignee of said Kansas Pacific Railway Company, as aforesaid, for the purpose of aiding the claimant in the construction of its railroad and telegraph line.

VIII. No bonds or pecuniary aid of any description were given by the United States to the claimant, but its railroad was duly approved by the President, and it has received the grant of the alternate sections of land along its line of road given by said acts of Congress to aid in the construction of the various Pacific roads, and to which it had become entitled by the duly-authorized assignment from the Kansas Pacific Railway Company hereinbefore mentioned.

IX. The claimant has rendered services to the Government of the United States in the carriage and transportation of the United States mails for the Post-Office Department over the railroad of the claimant,

and such services, the times when they were rendered, and the value and amounts due the claimant for such services, are fully specified in the following account:

52 *The United States, to the Denver Pacific Railway and Telegraph Company, Dr.*

A.—AMOUNT DUE FOR MAIL SERVICE.

1873.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles at $150 per mile per annum	$3,975 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $150 per mile per annum	3,975 00
July 1 to September 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
October 1 to December 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00

1874.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
July 1 to September 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
October 1 to December 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
	38,160 00
Less fares paid by special agents	40 00
	38,120 00

1875.

January 1 to March 31 (first quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
April 1 to June 30 (second quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
June 1 to September 30 (third quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
October 1 to December 31 (fourth quarter):	
Between Denver and Cheyenne, 106 miles, at $190 per mile per annum	5,035 00
	58,260 00

X. In all settlements for postal service previous to those specified in the account above referred to, performed on the railroad of the claimant, the United States Government has recognized the right to full payment therefor, and has made due payment for such service, with
53 out deduction on account of any debt due by the Kansas Pacific Railway Company to the United States.

XI. Since said date the United States Government has paid nothing to the claimant, or to any other person or corporation for such service; and there is now payable to said Denver Pacific Railway and Telegraph Company for such services, as shown by the account above referred to, the sum of $58,260.

XII. The Denver Pacific Railway and Telegraph Company is the sole owner of said claim, and the consideration therefor is the mail service actually performed by said company for the Post-Office Department.

XIII. Demand has been made of the Postmaster-General for payment of the amount due the claimants for said mail service, and payment has been refused.

XIV. The gross earnings of the Denver and Pacific Railway and Telegraph Company, from all sources, from 1870 to 1875 inclusive, were as follows:

Gross earnings, 1870:	
Freight	$166,852 27
Passenger	130,310 28
Miscellaneous	7,575 68
	304,738 23
Gross earnings, 1871:	
Freight	$148,428 86
Passenger	181,431 97
Miscellaneous	9,284 62
	339,145 45
Gross earnings, 1872:	
Freight	$182,435 02
Passenger	165,780 59
Miscellaneous	13,822 49
	362,048 10
Gross earnings, 1873:	
Freight	$124,365 29
Passenger	184,050 18
Miscellaneous	7,920 18
	316,335 65
Gross earnings, 1874:	
Freight	$125,174 46
Passenger	177,567 26
Miscellaneous	8,169 55
	310,911 27

Gross earnings, 1875:	
Freight	$133,307 15
Passenger	175,965 32
Miscellaneous	6,592 26
	315,864 73

54 RECAPITULATION.

Earnings:	
1870	$304,738 23
1871	339,145 45
1872	362,048 10
1873	316,335 65
1874	310,911 27
1875	315,864 73
	1,949,043 43

The amount of United States Government transportation ($103,346.76) is included in the above, of which a portion, as shown in Finding XI, is still due.

The operating and other expenses of the road during the same period were as follows: The item "proceeds to balance" shows the profits of operating the road each year, after deducting the operating expenses and sums expended each year for taxes and real estate, respectively, from the gross earnings for the year, as shown in Finding II.

Expenses, 1870:	
Operating	$156,003 27
Taxes, &c	6,662 00
Real estate purchased	6,603 75
Proceeds to balance	135,469 21
	304,738 23

Expenses, 1871:	
Operating	$142,975 64
Taxes, &c	8,274 51
Proceeds to balance	187,895 30
	339,145 45

Expenses, 1872:	
Operating	$144,158 18
Taxes, &c	12,794 64
Real estate purchased	2,856 50
Proceeds to balance	202,238 78
	362,048 10

Expenses, 1873:	
Operating	$132,599 29
Taxes, &c	3,604 98
Real estate purchased	11 25
Proceeds to balance	180,120 13
	316,335 65

Expenses, 1874:	
Operating	$115,865 88
Taxes, &c	22,437 81
Real estate purchased	558 25
Proceeds to balance	172,049 33
	310,911 27
55 Expenses, 1875:	
Operating	$125,521 44
Taxes, &c	13,718 06
Proceeds to balance	176,625 23
	315,864 73

RECAPITULATION.

Expenses:	
1870	$169,269 02
1871	151,250 15
1872	159,809 32
1873	136,215 52
1874	138,861 94
1875	139,239 50
	894,645 45

XV. The amounts paid for interest by the claimants, during the same period, were as follows:

INTEREST.

1870.—Face of coupons	$122,500 00	
13.09 premium	16,035 25	
		$138,535 25
1871.—Face of coupons	174,790 00	
13.09 premium	22,833 24	
		197,623 24
1872.—Face of coupons	174,580 00	
13.09 premium	22,852 52	
		197,432 52
1873.—Face of coupons	174,545 00	
15.09 premium	27,752 66	
		102,297 66
1874.—Face of coupons	173,250 00	
8.13 premium	14,085 22	
		187,335 22
1875.—Face of coupons	170,730 00	
15.2 premium	25,950 96	
		196,680 96
		1,019,904 85

The above payments of interest were made by the claimant upon the loan of $2,500,000 mentioned in Finding VI.

Additional finding made on request of defendants:

XVI. The claimant entered into the following agreement with the Pacific Railroad Company, Eastern Division:

"This indenture, made this 23d day of July, 1868, between the Union Pacific Railway Company, Eastern Division, parties of the first part, and the Denver Pacific Railway and Telegraph Company, parties of the second part, witnesseth:

"The said Union Pacific Railway Company, Eastern Division, a corporation, duly organized under the laws of the State of Kansas, and under the several laws of the United States to that effect, in consideration of the agreements and conditions herein contained on the part of the said parties of the second part, and of the sum of one dollar to them in hand paid, the receipt of which is hereby acknowledged, do hereby
56 assign, transfer, and quitclaim unto the said Denver Pacific Railway and Telegraph Company, a like corporation, duly organized under the laws of the Territory of Colorado, and to their successors and assigns, the right to construct, run, maintain, and operate all that portion of a line of railroad and telegraph lying between the city of Denver, in the Territory of Colorado, to a point of connection with the Union Pacific Railroad, and connecting at Denver with the line and track of the said Union Pacific Railway, Eastern Division, so as to form a continuous line of railroad and telegraph with said other railroads; hereby also assigning, transferring, and quitclaiming, as aforesaid, all the rights, privileges, or powers of constructing, owning, maintaining, and operating the said railroad and telegraph line between the points named and described as aforesaid, which the said Union Pacific Railway Company, Eastern Division, is or may be authorized to construct, own, maintain, and operate, by an act of the Congress of the United States of America, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July 1, 1862, and the acts amendatory thereof, approved, respectively, July 2, 1864, and July 3, 1866; hereby also assigning, transferring, and quitclaiming unto the said Denver Pacific Railway and Telegraph Company, their successors and assigns, all the rights, grants, donations, rights of way, and every other right and thing, so far as concerns or relates to that portion of the said railroad and telegraph line hereinbefore described and designated, the right to construct, own, maintain, and operate which is hereby assigned, to which the said Union Pacific Railway Company, Eastern Division, is or would be entitled under the acts of Congress aforesaid if this assignment had not been made; hereby also assigning, transferring, and quitclaiming, as aforesaid, unto the said Denver Pacific Railway and Telegraph Company, their successors and assigns, all rights to the railroad line or route to the railroad line or route as heretofore or now established, located, and fixed by the said Union Pacific Railway Company, Eastern Division, and as shown by their map on file in the Interior Department, between the city of Denver and the Union Pacific Railroad, as hereinbefore described, hereby fully vesting in the said Denver Pacific Railway and Telegraph Company, their successors and assigns, all the rights, privileges, and powers in and to the line or route so established, fixed, and located as aforesaid, between the points aforesaid, forming the connections and terminating as aforesaid, to which the said Union Pacific Railway Co., Eastern Division, is or would be entitled under the acts of Congress aforesaid if this assignment had not been made; it being, however, distinctly understood and agreed by and between the said contracting parties, and this assignment is upon this express agreement, that the said Denver Pacific Railway & Telegraph Company shall be authorized to and shall deviate from the route heretofore located between the points named by the said

Union Pacific Railway Company, Eastern Division, in such manner as to connect with the Union Pacific Railroad at a point at or near Cheyenne, said deviation being as by the line or route now being graded by the said Denver Pacific Railway & Telegraph Company; and both the parties to this agreement, each for itself, its successors and assigns, are hereby bound to use their best endeavors to secure the passage of, and in case of its passage or failure to pass the same, as affects each other, to carry out in good faith the stipulations of, an act now pending in the Congress of the United States of America, being Senate bill No. 570, and entitled 'A bill for a grant of land, granting the right of way over
57 the public lands to the Denver Pacific Railway and Telegraph Company, and for other purposes,' a copy of which act is hereunto annexed and made part of this agreement.

"The foregoing assignment is made upon the following express terms, stipulations, provisions, and conditions, to be done, observed, and performed by the said Denver Pacific Railway and Telegraph Company, their successors and assigns, and all persons claiming any right, title, or interest in the matters herein assigned by, through, or under the said Denver Pacific Railway and Telegraph Co., to wit:

"The said Denver Pacific Railway & Telegraph Company shall and will at any and all times hereafter well, truly, and faithfully do, observe, comply with, and perform all, each, and every act, requirement, term, stipulation, proviso, and condition of all the acts of Congress now in force (except as to the deviation in route hereinbefore recited) or which may hereafter be enacted, so far as concerns or relates to or affects that portion of the said railroad and telegraph line hereby assigned; also that said Denver Pacific Railway & Telegraph Co., their successors and assigns, shall and will construct and complete the said portion of said railroad and telegraph line herein and hereby conveyed by or before the year 1870, or within such further time as may hereafter be extended by Congress, and that they shall and will locate and construct that portion of said railroad and telegraph line herein and hereby assigned so as to run from the city of Denver to a point on the Union Pacific Railroad at or near Cheyenne, and the said line and track of said railroad shall be so located and constructed as to connect with the line and track of the said Union Pacific Railway Co., Eastern Division, in the city of Denver, and with the line and track of the Union Pacific Railroad at or near Cheyenne, so that when completed the same shall, with the said other railroads, form a continuous line of railroad and telegraph; and the said Denver Pacific Railway & Telegraph Company, and the Union Pacific Railway Co., Eastern Division, hereby bind themselves, their successors & assigns, to faithfully observe and to fully *to* carry into effect all the provisions and stipulations imposed upon them in the Senate bill, No. 570, hereinbefore referred to, amended as agreed upon, and which is hereunto annexed and made a part of this agreement.

"In witness whereof we, the presidents of the said contracting companies, have hereunto set our hands the day and date above written, subject to the ratification of the boards of directors of said companies.

"UNION PACIFIC RAILWAY CO., E. D.,
"By JNO. D. PERRY, *Prest.*
"DENVER PACIFIC RAILWAY & TEL. CO.,
"By JOHN EVANS, *Prest.*"

THOMAS SIMMS,
Assistant Attorney-General.

MAY 28, 1878.

CONCLUSIONS OF LAW.

1. That the claimants are entitled to recover the amount of their claim, $58,260.

2. That the defendants are not entitled to have their claim in set-off allowed.

X.—*Opinion of the court.*

RICHARDSON, J.:

The judgment of the court is that the claimants recover the sum of $58,260, and that the defendants' counter-claim be dismissed.

I am still of opinion that the decision of a majority of the court at the former hearing of this case on demurrer was correct (12 C. Cls. R., 237).

58 On careful reconsideration of the questions of law involved, I cannot bring my mind to the opinion that when by the transfer act (15 Stat., 324) Congress authorized the Kansas Pacific Railroad Company to sell and transfer part of its property and franchise to the claimants, with power to mortgage the same for $32,000 per mile of road, it intended that the United States should hold the large mortgage which it had from the Kansas Company extended over the property and road of the claimants thus authorized to be transferred to them.

I cannot believe that Congress would encourage, countenance, or permit that most objectionable business operation, so hazardous and pernicious, and so frequently leading to fraud, as the selling of part of a large property, subject to incumbrances on the whole for debts of others than the purchasers.

Such a gross departure from correct business principles, which must inevitably lead to embarrassment and litigation if not to ruin, cannot be contemplated by me as within the possible intention of the wisdom of Congress, and I search in vain to find any such unusual and ruinous obligation set forth in the statutes in language which can reasonably bear that construction, or which clearly indicates such an understanding on the part of the contracting parties or of Congress.

The exhaustive opinion of the court upon the demurrer, reviewing the provisions of the Pacific Railway acts bearing upon the questions of law here involved, renders it unnecessary to refer to them again.

DAVIS, J., concurring:

The argument on the demurrer in this case, and the decision of the court upon it, cover all the questions of law which are raised by the findings of fact on this trial. I therefore regard them as res adjudicatæ in this forum, and concur in the judgment of the court on that ground solely.

DRAKE, Ch. J.:

I adhere to the views expressed in my dissenting opinion on the demurrer in this case as reported in 12 C. Cls. R., and therefore dissent from the judgment of the court; but consent to the entry of the judgment, as Judge Nott concurred with Richardson and Davis, JJ., in rendering the same.

59, 60 XI.—*Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington, on the third day of June, A. D. 1878, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said The Denver Pacific Railway and Telegraph Company do have and recover of and from the United States the sum of fifty-eight thousand two hundred and sixty dollars ($58,260.00.)

61, 62 XII.—*Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on June 3, 1878, in favor of claimant, the defendants, by their Attorney-General, on the 11th day of June, 1878, make application for, and give notice of, an appeal to the Supreme Court of the United States.

S. F. PHILLIPS,
Solicitor-General, &c.

Filed June 11, 1878.

AT CHAMBERS.

Allowed.

C. D. DRAKE,
Chief Justice.

63 In the Court of Claims.

THE DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY
vs.
THE UNITED STATES.
} No. 10904.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusions of law thereon, of the opinions of the court and of the dissenting opinion, of the final judgment of the court, of the application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this nineteenth day of September, 1878.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 781. The United States, appellants, vs. The Denver Pacific Railway and Telegraph Company. Court of Claims. Filed 23d September, 1878.

In the Supreme Court of the United States

THE UNITED STATES
vs.
THE DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY.
No. 781.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

THE UNITED STATES
vs.
THE DENVER PACIFIC RAILWAY and Telegraph Company.
No. 781.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

PLEADINGS.

The petition claimed full compensation, in the sum of of $58,260, for services rendered to the United States in carrying mails, submitting that the grant assigned by the Kansas Pacific Railway Company was made upon condition that the company should keep such railroad and telegraph-line in repair and use, and should at all times transmit despatches over said telegraph-line, and transport mails, troops, munitions of war, supplies, and public stores upon said railroad for the government whenever required so to do by any department thereof, and that the government should at all times have the preference in the use of the same for all purposes aforesaid, at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the

same kind of service; but that such grant was not upon condition that the company should pay at maturity the bonds issued to the Kansas Pacific Railway, or any part thereof, or apply any part of the earnings of the claimant's company, or any part of any moneys due to it by the government, to the payment of such bonds. (Record, 1–3.)

The United States demurred to the petition, and the court overruled the demurrer, with leave to the United States to answer over. (Record, 9–20.)

The United States thereupon filed a counter-claim, alleging the liability of the claimant to pay 5 per cent. of its net earnings to the United States, and the right of the United States to retain one-half of the compensation due the claimant for services rendered, by reason of the terms and conditions of the grants to the Kansas Pacific Railway Company, of which, by operation of law, the claimant is an assignee; the bonds issued to the Kansas Pacific Railway Company remain unpaid, and the 5 per cent. and the one-half compensation are to be applied to their repayment, according to law. (Record, 21.)

To this the claimant filed a replication denying the liability of the Denver Pacific Railway and Telegraph Company, as set forth in the counter-claim, and praying for judgment in the sum of $58,260. (Record, 25.)

The court rendered judgment for the Denver Railway company in the sum of $58,260. (Record, 37.)

STATEMENT.

The question presented is one of statutory construction, and the provisions more or less directly bearing thereon are hereinafter mentioned and abstracted.

On July 1, 1862, was approved the act of Congress entitled "An act to aid in the construction of a railroad

and telegraph-line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." (12 St., 489.)

By section 9 the Leavenworth, Pawnee and Western Railroad Company of Kansas (an existing corporation) was authorized to construct a railroad and telegraph-line from the Missouri River, at the mouth of the Kansas River, so as to connect with the Union Pacific at the initial point on the one hundredth meridian, "*upon the same terms and conditions in all respects* as are provided in this act for the construction of the railroad and telegraph-line first mentioned" (Union Pacific).

The road so authorized to be constructed was one of several lines converging to the said initial point from the western termini of various existing railroads in the States east of the Missouri which the said act made provision for in order to connect the railroad system of the Northwest with the main Pacific line, and this road was to be the Missouri branch or connection.

It was regarded evidently at the time as the principal or most prominent eastern connection since it was authorized by the act of 1862 (section 10), after reaching the one hundredth meridian, to unite with the Union Pacific upon equal terms in constructing any unfinished portion of the main line, and by section 12 of the act of 1864 (13 St., 356), to go on with the trunk-line, upon default of said company.

The corporate title of the said Kansas corporation has been changed first to "Union Pacific Railway Company, Eastern Division," and then to "Kansas Pacific Railway Company," its present designation.

The "terms and conditions" of the organic act of 1862,

upon which it was authorized to build this connection, consisted of certain grants in aid to and certain corresponding obligations imposed upon the companies named in the act.

The grants were, in brief, a right and donation of way through the public lands (§ 2, 1862, § 3, 1864), a land-grant (§ 3, 1862, § 4, 1864), a grant of credit by loan of bonds of the United States, (§ 5, 1862, § 10, 1864, § 1, 1865); and these grants were made on condition that the company should pay the bonds at maturity, keep its railroad and telegraph line in repair and use, at all times perform certain services for the government as required; and on condition, also, that "all compensation (subsequently reduced to one-half) for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid, * * * and after said road is completed, until said bonds and interest are paid, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The provision as to said bonds was (section 5, 1862) that the Secretary of the Treasury, "for the purpose herein mentioned," should issue to the company, on the completion and equipment of forty (afterward twenty) miles of its road, one-thousand dollar bonds of the United States to the amount of sixteen per mile for such section of forty miles. The bonds were payable thirty years after date, with interest at 6 per cent., payable semi annually.

To secure their repayment, their issue and delivery to the company was declared *ipso facto* to constitute "*a first mortgage on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property*

of every kind and description, and in consideration of which said bonds may be issued," and, on refusal or failure of the company to redeem said bonds, or any part of them, "*the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States which at the time of said default shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States: Provided*, This section shall not apply to that part of any road now constructed."

These provisions were modified by section 10, 1864, so as to permit each company, on completion of a section, to issue its own bonds to the same amount and of like tenor with the guaranteed bonds as first-mortgage bonds "*on their respective railroad and telegraph lines*," and the lien of the United States bonds was subordinated to that of the bonds so "*authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States.*"

The preceding section, however (§ 9, 1864), had authorized any of the eastern connections to connect with the trunk west of the initial point "in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road and telegraph-line as shall be a departure from the route hereinbefore provided for its road, such company shall be *entitled to all the benefits and be subject to all the conditions and restrictions of this act: Provided*

further, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude, nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."

This limitation of the bonds issuable is also mentioned in the twelfth section of the act in connection with authority given the beforementioned railroad to build a branch from Leavenworth to Lawrence.

By an act of March 3, 1865 (13 St., 504), the roads provided for by before-mentioned acts were authorized to issue their 6 per centum thirty-year bonds upon their separate roads.

Again, by act of July 3, 1866 (14 St., 79), amending the act of 1864, the said railroad company was authorized to designate the general route of its road on a different plan from that previously directed; but, in connection with the change, *the precious limitation as to the number of bonds issuable to it is repeated*, and it is also provided "that said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver in Colorado."

On March 3, 1869, the Kansas Pacific Railway Company had completed its road to Sheridan, a distance of 404 miles from the Missouri River and 235 miles from Denver, and had previously thereto received from the United States $6,303,000 in bonds, being the number of bonds it would have been entitled to if it had connected with the Union Pacific Railroad on the one-hundredth meridian, namely, at the rate of $16,000 per mile on

393$\frac{5}{16}$ miles of its road westward from the Missouri River, and which was the entire pecuniary aid to which it was entitled. (Record, 27, finding iv.)

The act of March 3, 1869, authorized the said company to contract with the claimant, a corporation of Colorado Territory, "for the construction, operation, and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific Railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company *the perpetual use of its right of way and depot-grounds, and to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line.*"

By section 3 the two companies were authorized to mortgage their respective portions of the road for not exceeding $32,000 a mile, to enable them, respectively, to borrow money to construct the same: each company to receive patents for alternate sections of land, as provided in the grant to the original or Kansas company, *but neither to be entitled to subsidy in United States bonds under provisions of the act.*

A contract was made under and according to the provisions of said act.

The Kansas Pacific Railway Company, in pursuance of last-mentioned act, proceeded to complete its railroad from Kansas City (connecting there with the Missouri Pacific Railroad) to Denver, connecting there with the line of said Denver Pacific Railway and Telegraph Company, and completed same in August, 1870, and the Denver Pacific Railway and Telegraph Company mort-

gaged its road from Denver to Cheyenne for the sum of $2,500,000 to enable it to borrow money to construct the same, and issued and sold its bonds secured by said mortgage, and with the funds so obtained constructed its railroad from Denver to Cheyenne, in the Territory of Wyoming, and completed same on or about July 1, 1870. (Record, 29, finding vi.)

By virtue of various acts of Congress, and of said contract and grant, the rights, powers, donations, grants of lands, rights of way, privileges, and franchises granted to the Kansas Pacific Railway Company for the construction of that portion of its line between Denver and Cheyenne became vested in said Denver Pacific Railway and Telegraph Company, as assignee of said Kansas Pacific Railway Company, as aforesaid, for the purpose of aiding the claimant in the construction of its railroad and telegraph line. (Finding vii.)

No bonds or pecuniary aid of any description was given by the United States to the claimant, but its railroad was duly approved by the President, and it has received the grant of the alternate sections of land along its line of road given by said acts of Congress to aid in the construction of the various Pacific roads, and to which it had become entitled by the duly-authorized assignment from the Kansas Pacific Railway Company hereinbefore mentioned. (Finding viii.)

The claimant has rendered services to the Government of the United States in the carriage and transportation of the United States mails for the Post-Office Department over the railroad of the claimant, the compensation for which amounts to $58,260. (Finding ix.) The value of the transportation performed by the claimant for the United States is $103,346.76. (Record, 32, folio

54.) The net earnings of the claimant during the period covered by the counter-claim amounted to $1,054,397.98. (Record, 32, 33.)

The act of June 20, 1874 (18 St., 111), amendatory of the act of 1864, provides "that for all the purposes of said act and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine."

By the act of March 3, 1873 (17 St., 508), "the Secretary of the Treasury is directed to withhold all payments *to any railroad company and its assigns* on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the 5 per cent. of net earnings due and unapplied, as provided by law; and provision is made for suit by the company in this court to recover the price of such freight and transportation, and for the proceedings therein.

ASSIGNMENT OF ERRORS.

1. The court erred in entering judgment for the claimant in the sum of $58,260.

2. The court erred in deciding that the United States was not entitled to retain in the Treasury one-half of the compensation due the claimant for services rendered to the United States, viz, the amount of $51,673.38. (Record 32, finding xiv.)

3. The court erred in refusing to enter judgment on

the counter-claim for the United States in the sum of $52,719.89, being 5 per cent. of the net earnings of the claimant's railroad company for the period covered by the counter-claim.

4. The court erred in refusing to enter judgment for the United States for $104,393.27, subject, however, to a deduction of $29,130, being one-half of the compensation earned by the claimant when carrying the mails, leaving a balance of $75,263.27.

ARGUMENT.

I.

Whatever privity of contract there may be between the claimant and the United States on which to sustain this action, is found in, or at least originated with, the act of March 3, 1869.

At that date, the Kansas Pacific Railway Company, in consideration of certain grants from the United States, had assumed certain obligations toward them, some part of which grants and obligations it was proposed by said company to transfer to the claimant, and to authorize this the act in question was obtained.

To get a clear understanding of the effect of this act, the precise relation of the Kansas company to the United States at the time should be determined.

Under the act of 1862 that company was authorized to build a road from Kansas City to the initial point on the one hundredth meridian, a distance of, say, 394 miles, for which purpose the organic act granted in aid, among other things, a roadway on public lands 400 feet wide, a further donation in alternate sections of 12,800 acres of land per mile for the entire distance (worth at the mini-

mum price $16,000 per mile), and a loan of thirty-year bonds to the amount of $16,000 per mile, also for the entire distance.

These bonds constituted by the act a first mortgage (subsequently modified) on the whole line, with its stock, fixtures, and property of every kind, all of which, including every right, function, immunity, and appurtenance, was forfeitable for default in redeeming any part of the bonds.

The indebtedness by reason of this loan was to be reduced by application thereto of all compensation (afterward one-half) for transportation required by the United States, and not less than 5 per cent. of the net earnings.

By section 9 of the act of 1864, the restriction of the route to a connection at the initial point was removed, and connection with the trunk west thereof permitted, "in case such company shall deem such westward connection more practicable or desirable."

The Kansas company took advantage of this provision, and in course of time adopted its present route, departing therein widely from that originally contemplated, and traversing a distance of, say, 745 miles, or about 351 miles more than as first proposed. This is including the part (106 miles) operated by the claimant.

But the United States while giving this privilege of deviation, carefully prescribed the relations of the parties and the limits of their aid toward the part in deviation by providing in the same section that as to such part the "company shall be *entitled to all the benefits* and be *subject to all the conditions and restrictions* of this act," but should receive no additional bonds or sections of public land.

In case, therefore, of such departure from the estab-

lished route, the company so electing was notified that "all the conditions and restrictions of the act" would attach to the part in deviation, and but a part only of the "benefits."

"The conditions and restrictions of the act" referred to are (so far as concerns the present controversy) contained in section 6, 1862, and especially in this, that the company should transport the mails, troops, &c., *upon its railroad* on condition that all compensation therefore (reduced to one-half in section 5, 1864), together with 5 per cent. of the net earnings, should be applied to the payment of said bonds and interest until fully paid.

The amendatory act of July 3, 1866 (14 Stat., 79), authorizes and confirms the then proposed departure of the Kansas company, limiting, however, the point of connection with the Union Pacific, and repeating the limitation on the issue of bonds, but not that as to the grant of alternate sections. The omission of this, and the provision inserted, that "upon the filing of the said map showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior," was claimed as indicating that the land-grant was thereby made coextensive with the line.

With this modification it is next in order to discuss the act of March 3, 1869.

The United States then had given the Kansas company the franchise of a railway and telegraph-line from Kansas City, on the Missouri, via Denver, Colo., to a point of connection with the Union Pacific at some point not more than 50 miles west of the meridian of Denver, with a roadway 400 feet wide over the public lands all the way,

a land-grant of 12,800 acres per mile all the way, a loan of $6,303,000, in thirty-year bonds, the semi annual interest on which the United States were bound to keep paid up, and the right to raise as much more on the granted property and franchise by mortgage, to which (with certain exceptions) the lien of the United States "on the whole line of the railroad and telegraph, together with the rolling-stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued," was made subordinate.

In return, the Kansas company had agreed and was bound to operate the entire line in conformity with the prescribed conditions, which had been reserved, moreover, from the effect of the transposition of the government lien on the road, and were therefore bound to apply the compensation for mail-service on the whole line to reduction of the bonded debt to the United States.

In the mean time the claimant corporation had organized under the Territorial law of Colorado, with what particular franchises does not appear; with none certainly from the United States, and with none evidently that could be maintained, or perhaps exist, in competition with the franchise and grants vested in the Kansas company. It had apparently graded some road-bed on a route from Denver to Cheyenne, which could be utilized by combination with the Kansas company, and the two companies, for reasons satisfactory to themselves, sought the necessary authorization from the United States to enable them to enter into relations with each other, and thus was procured the act in question, which is now to receive construction.

The position of the company is, in substance, that the lien of the United States on the Kansas company's road

for its loan of $6,303,000 was confined to that part of the line extending about 394 miles from Kansas City, on the completion of which, in sections, the bonds were issued; hence the part of the line transferred to claimants came to them unincumbered by any servitude or obligation respecting the said bonded debt; that the security of the United States for such debt, aside from the said limited lien, rested only on the personal obligation of the Kansas company, which was not an obligation "pertaining to said part of the line," and so did not pass to the transferee under the act. The conclusion is, that never having assumed any obligation respecting the bonded debt, no part of their earnings can be applied to its reduction.

The fundamental statement here that the lien of the bonds of the United States is confined to a part only of the line seems in direct contradiction of the statute as heretofore cited (sec. 5, 1862), and no amount of argument can make the case plainer than the legislative words, "shall *ipso facto* constitute a first mortgage *on the whole line*," &c.

But it is urged that the last phrase of the clause just mentioned, namely, "and in consideration of which said bonds may be issued," supports in some way the limitation claimed.

To this it may be answered, first, that the consideration for issuing the bonds must needs be something done or conceded by the company for the benefit of the United States, and the act or concession contemplated was probably the submission of all the company property to the lien as prescribed. But, secondly, supposing that this phrase relates to the extent of the lien, it clearly included the entire line, and property of the Kansas company at the time of enactment, and if the company thereafter chose

to extend its line and accept additional grants therefor, it took these grants with the conditions annexed by the act, and among these was the condition which made the whole line and its earnings subject to the reduction and discharge of the government lien, and this, also, meets the suggestion that it was a provision for cases like that of the Hannibal and Saint Joseph Company (section 13, 1862), having already a road built to Saint Joseph, but authorized by the act to extend it to meet the Kansas road, or the main trunk, "upon the same terms and *conditions* in all respects, *for one hundred miles*," &c.

Here the *conditions* are expressly limited to the *hundred miles*. It follows that there was no road existing or contemplated by the act of 1862 to which such a provision as that contended for by claimant was then applicable, and that would seem to render their construction futile.

The railroad upon which bonds were to be issued extended, in 1866, to Denver, Colo., and in a northwardly direction to Cheyenne, Wyo., connecting at this point with the Union Pacific Railroad. Bonds of the United States were issued, after the act of 1864 and act of 1866, to the Kansas company. The Kansas company accepted the rights and privileges of the acts of 1866, designating the route and filing the map in conformity to the law, and promised to build a road westwardly of Kansas City. Having fixed the line of road that was authorized to be built, the next point to be decided is, What were the relations of that road to the United States in the matter of lien?

The construction put on the words "and in consideration," &c., by the claimant, is further shown to be incorrect, from the circumstance that all the railroads that

were contemplated by this act were subsidized their entire length, and that therefore the bonds were issued in consideration of whatever roads were authorized by the act of 1862. When the Kansas road was subsequently extended by act 1864, section 9, and act July 3, 1866, section 1, the obligation of the mortgage still extended over the whole line of railroad, and its extension was dependent upon the conditions that all the obligations, including the lien of the government mortgage, should cover the whole line of road contemplated by these acts.

A further proof that the lien of the government was upon the whole line of the road is furnished by the last clause of section 5, which provides that the Secretary of the Treasury shall take possession of the road, on the failure to redeem the bonds, as it will exist in the year 1900, at which date the Supreme Court decided in the case of the Union Pacific Railroad *vs.* The United States, 1 Otto, 72, that the bonds and interest shall become payable. It was the road that would be then existing in 1900, and whatever road was authorized to be built under the acts, was subject to forfeiture and foreclosure in case of default to redeem the bonds, and this road that was so authorized could be followed in all its parts, whoever had possession of it, however divided in ownership as between third parties—the privity, however, only existing between the government and the Kansas Pacific Railroad.

That the railroad that was to be mortgaged was not confined to the three hundred and ninety fourth milepost is further shown by the provision of the act of 1864, section 9, which provides, as has been seen, for the building of the road west of the one hundredth meridian, but

only subject to the conditions and restrictions of the acts relating to the Pacific Railroad.

Section 10 of the act of 1864 authorizes the Union Pacific, the Central Pacific, and any other company within these acts, to issue their first-mortgage bonds on their respective railroads and telegraph lines. The preceding section having authorized the building of a railroad by the Kansas company west of the one hundredth meridian, the railroad in that case upon which first-mortgage bonds could be issued was the road contemplated by that section.

In the consideration of the questions arising under the Pacific Railroad acts, the defendants have taken the acts as forming one act; and it is urged that the acts of 1862, 1864, and 1866 are, within the contemplation of law, one act, and are to be construed together as far as the intention of Congress is to be determined in the authorization of the construction of a railroad in Kansas.

The construction placed upon the acts as to the effect of the government lien on the railroad of the Kansas company is fortified by the case of Galveston Railroad *vs.* Cowdrey, 11 Wall., 459 and 480. This case decided that the first mortgage and all the mortgages took precedence from the date of the issue, without regard to the existence of property at the time of the issuance; but the road that was within contemplation at the time of their issuing, although unbuilt, was subject to their lien.

No discussion is necessary as to the effect of the construction of the law on the first mortgage of the company or of any subsequent mortgage, as they can have no bearing on the determination of this question.

The argument that hardship might result to the holders of the various mortgage bonds cannot be addressed

to the court in considering the relations and obligations of the Kansas company and its assigns to the United States for the entire line of road authorized by Congress.

II.

But even conceding that the lien of the bonds is confined to three hundred and ninety-four miles of the Kansas company's road, the effect would not be as claimed, for we contend the liability of the claimant may and does rest on other grounds.

Section 6, 1862, declares that the *grants* aforesaid are made upon condition that said company shall pay said bonds at maturity, and at all times transport mails upon said railroad and apply the compensation as prescribed. The "*grants*" include much more than the bond loan, and the obligation to pay the bonds and to transport the mails under the prescribed condition as to compensation rests as much on the grant of way or the land-grant as on the loan. How then can a company which took these grants for the entire route claim that any part of its line is not subject to the said and every other condition? How, indeed, can it be maintained that the said obligations do not pertain to that part of its line in controversy, when the object of the act was to enable the claimant to obtain the grants which are charged with these obligations and which have never been conceded without annexing them?

The pretense that Congress intended to give the claimant the right of way, land-grant, and other rights and privileges under the Pacific Railroad acts, discharged of any obligation to which the Kansas company was bound, in respect of the same grants, can hardly be sustained or need discussion.

It is insisted, therefore, that, as transferee, the claimant is bound to pay the bonds, &c., to the extent that such obligations pertain to its part of the whole line subjected to them. The possible complications and even hardship to the claimant that this doctrine may involve are, strictly speaking, of no consequence, and do not require consideration here. The claimant must be presumed to have contemplated such liabilities before assuming its present obligations.

These contingencies, however, are much pressed in argument, and it may be suggested, in response, that experience shows that such imaginations are seldom realized; that no more is required of the claimants in this instance than they have agreed to perform as the law demands; and that if ever the mutual relations and obligations of the claimant and the Kansas company in respect of the government loan require to be adjusted and settled, there is no reason to doubt that the rights and duties of all parties can and will be justly determined, on the facts presented, by the proper tribunal.

Is this connection it should be observed that the claim is for full compensation for the service rendered, and that by the amendment of 1864 and the ruling of the courts in the Union Pacific case thereon, the United States can retain but the half compensation. The whole was retained, of course, in consequence of the act of March 3, 1873 (17 St., 508), subject to determination of the rights of the parties by this court.

The claimant contends that it is not "assigns" within the meaning of said act, and that their suit is not brought under it, but under the ordinary jurisdiction of the court, as to which it is contended by the United States that there is no distinction possible between the assign (if

any) created by the act of 1869 and the assigns contemplated by the act of 1873. The claimant, as such assign, must bring suit under the act of 1873, as a prescribed statutory remedy supersedes the ordinary jurisdiction.

On this question, whether the Denver Pacific Company is an assignee of the Kansas Pacific Company and liable for its obligations, attention is called to the last clause of section 15, act of July 1, 1862 (12 Stat., 489): "Wherever the word company is used in this act, it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words had been properly added thereto."

III.

Again, under section 6, act of 1862, the company was bound to keep the railroad in repair and use, and transport mails, troops, munitions of war, &c., upon said railroad for the government; and it is admitted by the claimant that this obligation refers to the whole line of road, and that the services to be rendered were over the whole line of railroad without reference to the extent of government lien. It naturally follows that the compensation for services rendered refers to the services rendered on the whole line of road; in this case, from Kansas City to Denver and northward to the Union Pacific Railroad, the same railroad that is referred to in the first part of the section, that railroad being whatever road was built or to be built by the Kansas company from Kansas City to Denver and westwardly to the Union Pacific Railroad.

IV.

The questions, whether the 10th section of the act of July 2, 1864, repealed or postponed the operation of the last clause of the 6th section of the act of July 1, 1862, and what are net earnings, are discussed in the briefs on the part of the United States in Nos. 418 and 736. The attention of the court is called to them.

CHARLES DEVENS,
Attorney-General.
JOS. K. McCAMMON.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 781.

THE UNITED STATES, APPELLANTS,

versus

THE DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY.

Appeal from the Court of Claims.

BRIEF OF HENRY BEARD, OF COUNSEL FOR APPELLEE.

Judd & Detweiler, Printers.

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Appeal from the Court of Claims.

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SATEMENT OF THE FACTS AND LAW.

The appellee sued the United States, in the Court of Claims, for $58,260, a balance due for services rendered in carrying the U. S. mails over its railroad between Denver, Colorado, and Cheyenne, Wyoming, from January 1, 1873, to December 31, 1875, inclusive, and final judgment in that court was entered for that amount on the 3d June, 1878, from which the United States has appealed to this Court. (Printed Record, pp. 26–37.)

Payment of the amount was refused by the Executive Departments, (Record, pp. 7 and 8,) because of section 2d in the appropriation act of March 3, 1873, 17 Stat., p. 508, which is as follows:

"SEC. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied, as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States, upon the merits of all the points presented by it in answer thereto by them, and either party to such suit may appeal to the Supreme Court and both said courts shall give such cause or causes precedence of all other business."

The appellant demurred to the petition in the court below, but the demurrer having been overruled, (Record, pp. 9 to 20, inclusive,) the Attorney General traversed the petition and filed a counter-claim, to which the appellee answered, denying any indebtedness to the United States, (Record, pp. 21 to 27, inclusive.)

The findings of fact and conclusions of law are found in the Record, pp. 27 to 36, inclusive.

The important findings are condensed as follows:

I. The Denver and Pacific Railway and Telegraph Company is a corporation, duly incorporated under the laws of the Territory of Colorado.

II. The Kansas Pacific Railway Company is a corporation duly incorporated by an act of the Legislature of the Territory of Kansas, passed in the year 1855, and entitled "An act to incorporate the Leavenworth, Pawnee, and Western Railroad Company."

III. The name of said corporation has since been legally changed, first to the "Union Pacific Railway Company, Eastern Division," and then to the "Kansas Pacific Railway Company."

IV. On March 3, 1869, said Kansas Pacific Railway Com-

pany had completed its road to Sheridan, a distance of 404 miles from the Missouri River and 235 miles from Denver, and had previously thereto received from the United States $6,303,000 in bonds, being the number of bonds it would have been entitled to if it had connected with the Union Pacific Railroad on the one hundredth meridian, namely, at the rate of $16,000 per mile on 393$\frac{5}{6}$ miles of its road westward from the Missouri River, and which was the entire pecuniary aid to which it was entitled.

V. On the 19th March, 1869, the Kansas Pacific Railway Company, in pursuance of an act, approved March 3, 1869, entitled "An act to authorize the transfer of lands granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver, in the Territory of Colorado," contracted with the Denver Pacific Railway and Telegraph Company for the construction, operation, and maintenance of its line from Denver to its point of connection with the Union Pacific Railroad at Cheyenne, and granted and transferred to it all the rights and privileges subject to the obligations pertaining to that part of its road. (Copy of contract in record, at p. 28.)

VI. The Kansas Pacific Railway Company, in pursuance of said last-mentioned act, proceeded to complete its railroad from Kansas City, (connecting there with the Missouri Pacific Railroad) to Denver, connecting there with the line of said Denver Pacific Railway and Telegraph Company, and completed same in August, 1870, and the Denver Pacific Railway and Telegraph Company mortgaged its road from Denver to Cheyenne for the sum of $2,500,000 to enable it to borrow money to construct the same, and issued and sold its bonds secured by said mortgage, and with the funds so obtained constructed its railroad from Denver to Cheyenne, in the Territory of Wyoming, and completed same on or about July 1, 1870.

VII. By virtue of various acts of Congress, and of said contract and grant, the rights, powers, donations, grants of lands, rights of way, privileges, and franchises granted to the Kansas Pacific Railway Company for the construction of that portion of its line between Denver and Cheyenne became vested in said Denver Pacific Railway and Tele-

graph Company, as assignee of said Kansas Pacific Railway Company, as aforesaid, for the purpose of aiding the claimant in the construction of its railroad and telegraph line.

VIII. No bonds or pecuniary aid of any description were given by the United States to the claimant, but its railroad was duly approved by the President, and it has received the grant of the alternate sections of land along its line of road given by said acts of Congress to aid in the construction of the various Pacific roads, and to which it had become entitled by the duly-authorized assignment from the Kansas Pacific Railway Company hereinbefore mentioned.

IX. The claimant has rendered services to the Government of the United States in the carriage and transportation of the United States mails for the Post Office Department over the railroad of the claimant, &c.

[The amount due from January 1, 1873, to December 31, 1875, is stated in this finding to be $\$58{,}260\frac{00}{100}$. For details see p. 30 of record.]

X. In all settlements for postal services previous to those specified in the account above referred to, performed on the railroad of the claimant, the United States Government has recognized the right to full payment therefor, and has made due payment for such service, without deduction on account of any debt due by the Kansas Pacific Railway Company to the United States.

XI. Since said date the United States Government has paid nothing to the claimant, or to any other person or corporation for such service; and there is now payable to said Denver Pacific Railway and Telegraph Company for such services, as shown by the account above referred to, the sum of $58,260.

Findings XII and XIII state ownership, demand and refusal. (P. 31.)

Finding XIV (record, pp. 31, 32,) states the gross earnings of the appellee, from freight, passengers, and miscellaneous sources, for the years 1870, 1871, 1872, 1873, 1874, and 1875; which are followed (pp. 32, 33) by statements of amounts for the same years respectively of operating ex-

penses, taxes paid, real estate purchased, and "proceeds to balance," which, annually aggregated, balance the annual gross receipts.

Finding XV shows the amounts paid in United States notes during each year for liquidation of the annual coin interest accrued during the same years upon the loan of $2,500,000, mentioned in finding VI. (Record, p. 33.)

Finding XVI sets forth a copy of an agreement between the two railroad companies, executed July 22, 1868. (Record, pp. 34, 35.)

Conclusions of Law.

1. "That the claimants are entitled to recover the amount of their claim, $58,260.00."

2. "That the defendants are not entitled to have their claim in set-off allowed." (Record, p. 36.)

The United States has appealed from the judgment below, and relies upon the act of Congress of March 3, 1869—the only act in which the appellee is named—as authorizing and requiring the Government to retain one half the compensation earned by the transportation of mails, troops, and Government property over the railroad of the appellee, and to have payment of five per centum of the annual net earnings of the appellee.

The appellee contends that said act, properly construed, does not sustain the position of the United States in this cause.

The whole of this law will come under discussion in this argument, and it is here quoted for that reason, though already printed in the record, pp. 4 and 5, and 15.

It is found in the Statutes, vol. 15, p. 324:

AN ACT

To authorize the transfer of bonds granted to the Union Pacific Railway Company, Eastern Division, between Denver and the point of its connection with the Union Pacific Railway, to the Denver Pacific Railway and Telegraph Company, and to expedite the completion of railroads to Denver in the Territory of Colorado.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, Eastern Division, be, and it hereby is authorized to contract with the Denver Pacific Railway and Telegraph Company, a corporation existing under the laws of the Territory of Colorado, for the construction, operation and maintenance of that part of its line of railroad and telegraph between Denver City and its point of connection with the Union Pacific railroad, which point shall be at Cheyenne, and to adopt the road-bed already graded by said Denver Pacific Railway and Telegraph Company as said line, and to grant to said Denver Pacific Railway and Telegraph Company the perpetual use of its right of way and depot grounds, and to transfer to it all the rights and privileges, subject to the obligations pertaining to said part of its line.

SECTION 2. *And be it further enacted*, That the said Union Pacific Railway Company, Eastern Division, shall extend its railroad and telegraph to a connection at the city of Denver, so as to form with that part of its line herein authorized to be constructed, operated and maintained by the Denver Pacific Railway and Telegraph Company, a continuous line of railroad and telegraph from Kansas City, by way of Denver, to Cheyenne. And all the provisions of law for the operation of the Union Pacific railroad, its branches and connections, as a continuous line, without discrimination, shall apply the same as if the road from Denver to Cheyenne had been constructed by the said Union Pacific Railway Company, Eastern Division, but nothing herein shall authorize the said Eastern Division Company to operate the road or fix the rates of tariff for the Denver Pacific Railway and Telegraph Company.

SECTION 3. *And be it further enacted*, That said companies are hereby authorized to mortgage their respective portions of said road, as herein defined, for an amount not exceeding

thirty-two thousand dollars per mile, to enable them respectively to borrow money to construct the same; and that each of said companies shall receive patents to the alternate sections of land along their respective lines of road, as herein defined, in like manner and within the same limits as is provided by law in the case of lands granted to the Union Pacific Railway Company, Eastern Division: *Provided*, That neither of the companies hereinbefore mentioned shall be entitled to subsidy in United States bonds under provisions of this act.

Approved March 3, 1869.

ARGUMENT.

Comments on the Findings.

The appellant maintains—

1. That the United States have the right, under the statute referred to in the record and in the brief of the Attorney General, to retain at least one-half the amount sued for.

2. That the claimant was indebted to the United States at the commencement of this suit in sundry amounts which can be legally offsetted against its demand. The offset items are computed in appellant's brief, (pp. 9 and 10,) as follows:

One-half all earnings for transportation rendered for the U. S. prior to January 1, 1876 (Record, 32, finding 14.)	$51,673 38
Five per centum on annual net earnings of the company prior to same date, on the basis of computation assumed by appellant	52,719 89
Total	104,393 27
Less half the amount sued for	29,130 00
Balance	$75,263 27

Before proceeding to the points of argument, I submit a few remarks on the above computation.

The item of $51,673.38 has not been found by the Court of Claims, nor is it possible, as I understand the matter, to make a correct calculation upon the finding. The finding No. 14, on this subject, is as follows (p. 32):

"Earnings." "Recapitulation." Aggregate "$1,949,-043.43."

"The amount of United States Government transportation ($103,346.76) is included in the above, of which a portion, as shown in finding XI, is still due." Turning to finding XI, it appears that $58,260 is found due in this case for "postal service." This finding, and also finding No. X, relate to "postal service" only. But the $103,346.76 (of which $51,673.38 is the one-half) is on "account of United States Government transportation" for the six years, and, as stated, (p. 31, finding 14,) is a part of "gross earnings" * * "from all sources," plainly including transportation of troops, military and Indian supplies, &c. Now, as there is $58,260 balance due for "postal service" alone, it is quite apparent that there are unpaid earnings for other transportation included in the $103,346.76 as well as for "postal service." Such I understand to be the actual fact, and surely the finding of the Court of Claims is not to the effect that the unpaid "postal service" account is the only unpaid account included in the $103,346.76.

The evidence of all actual payments to the appellee of full compensation was in the possession of the Government, and it should have produced that evidence in the case and obtained a proper finding thereon by the Court of Claims. As the case stands, I respectfully submit that the findings do not support the item of counter claim amounting, as alleged, to $51,673.38.

As to the second item of offset claimed—viz.: five per centum on annual net earnings of the appellee for six year—viz.: $52,719.89; I reach that sum by calculating

five per centum on the difference between $1,949,063.43, and $894,645.45, (Record, pp. 32 and 33,) viz.: $1,054,397.98. This difference includes the unpaid bills against the United States, and presents the Government in the attitude of demanding an offset which is increased by its own failure to pay—a position which would be quite embarrassing to a private litigant. But I do not propose to enter on an argument of the question whether the United States is entitled to five per centum on its own debts to the company, or on any particular sum of money. I remark merely, that if the interest paid by the appellee, $1,019,904.85, prior to January 1, 1876, on its bonded debt of $2,500,000, is deducted, (finding XV,) and the unpaid moneys due from the United States are likewise deducted before five per centum is computed, there will be no appreciable sum of "net earnings" on which the five per centum will raise money.

The appellee denies any liability whatever to pay five per centum, and this argument in the matter of five per centum, will be restricted to this denial.

In respect to any alleged indebtedness of the Kansas Pacific Railway Company to the United States, it is respectfully submitted that the findings are also inadequate and imperfect. Neither the fact nor amount of such indebtedness has been found. The only fact found is, that prior to 3d March, 1869, the Kansas Company had received $6,303,000 in bonds of the United States for 393$\frac{5}{6}$ miles of road westward of the Missouri river, which was the entire pecuniary aid to which it was entitled.

If the fact of delivery of bonds to that company is sufficient to show against that company, in its suits with the United States, a corresponding indebtedness, and to throw the burden of proof of payment on that company, it is respectfully submitted that the Denver Pacific Company is an entire stranger to that transaction: the bonds were delivered before the Denver Company had any dealings with the United States or with the Kansas Company, and the mere

fact of such delivery does not warrant the assumption against the Denver Company in this suit that such bonds are due and outstanding. The claimant traversed the entire counter-claim of the United States, in general and in detail, (Record 25, 26, and 27,) and if the United States seeks to charge the claimant with a debt due to them by the Kansas Company, the existence of the debt must be plainly established in the affirmative, and not left to implication.

QUESTIONS AT ISSUE.

From these comments upon the record, we pass to the discussion of the questions of law involved:

1st. Have the United States a right to retain half the amount of compensation for transportation furnished them by the Denver Pacific Railway Company; and have they a right to be paid five per centum upon the annual net earnings of said company?

2d. Is the Denver Company liable for the indebtedness of the Kansas Pacific Railway Company, growing out of the receipt by the latter company of the $6,303,000 of United States bonds, prior to March 3d, 1869?

Upon these questions, the United States holds the affirmation, and the claimant the negative.

The half compensation and five per centum are so intimately associated in all the provisions of the statutes on the subject, that they will not be separated in this argument.

PROPOSITIONS OF THE APPELLEE.

I.

The United States has not a right to the half compensation for transportation services, and to 5 per centum, from the Denver Pacific Company, because no subsidy bonds were delivered by the

United States to that company, or pecuniary aid of any description given. (*Finding 8th.*)

The careful reading of sections 5 and 6 of the act of July 1, 1862, compels every candid mind to the conclusion, that the payments prescribed, are to be made where and where only subsidy bonds have been issued and delivered to any company. When the debt accruing from the receipt of the bonds is liquidated, the obligation to pay no longer exists.

In section 5, the mortgage lien declared is "to secure the *repayment* to the United States of the amount of said bonds so issued and delivered to said company." On refusal or failure of the company *to redeem the bonds when due*, the Secretary of the Treasury can seize the railroad and its equipments for the benefit of the United States.

Section 6:

"And all compensation" (amended in 1864 to one-half) "for services rendered for the Government shall be applied to the payment of said bonds and interest *until the whole amount is fully paid.* * * * And after said road is completed, *until said bonds and interest are paid*, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

At the date of the act of 1862, the reciprocal engagements of the parties were wholly in the future.

The entire object and purpose of the half compensation and the five per centum was to apply the amounts to the bonds to be issued to the company, until said bonds and interest are fully paid. If no bonds were ever delivered to the company, it has not contracted to pay any.

The company that has received no bonds is no more liable to pay to the United States the half compensation and the five per centum than would be a company that had fully redeemed all the bonds and interest thereon which had been delivered to it.

The reasoning of this Court, in the Union Pacific case, 91st U. S. Rep., pp. 83, 84 and 85, is in full support of the position I have taken. Having quoted sec. 6, act 1862, this Court said in that case, (p. 85.):

"Leaving out of consideration the parts of this section "not pertinent to the present inquiry, there are three "things, and three only, which the corporation is required "to do concerning the bonds in controversy. 1st. To pay "said bonds at maturity. 2d. To allow the Government to "retain the compensation due the corporation for services "rendered, and apply the same to the payment of the bonds "and interest, until the whole amount is fully paid. 3d. To "pay over to the Government, after the road shall have been "fully completed, five per cent. of the net earnings of the "road to be appropriated to the payment of the bonds and "interest."

That the appellee should be bound to pay money into the United States Treasury, to create a fund to be applied in future to the payment of a debt to the Government, when there is no debt either due or to become due, would be contrary to the common sense of mankind. No law should receive a construction leading to such an absurdity, if any other construction is practicable.

The appellee obtained no bonds. It incurred no liability to pay bonds at maturity. It is under no obligation to contribute a fund in the present for redeeming bonds.

If it were true, as contended by the Attorney General, that the Denver Company is liable to all the duties and obligations imposed on the Union Pacific or the Kansas Pacific Company, the duty to redeem bonds could not be construed as extending to any other bonds than such as had been delivered to it in pursuance of the acts of Congress. That is the extent of liability imposed on any one company named in these laws, and if it were not clear, from the very nature of the case, it becomes so from the consideration of the latter clause of sec. 7, act July 2, 1864, providing that—

"The failure of any one company to comply fully with "the conditions and requirements of this act, or the act to "which this is amendatory, shall not work a forfeiture of "the rights, privilege, or franchise of any other company "or companies that shall have complied with the same."

There is no liability of any one company for bonds delivered to any other company.

The whole tenor of the laws is that each company acquires its own benefits, and takes its own liabilities and duties to the United States, and not one company for another. Nor can any one company be held to reimburse the United States beyond the amount of the identical bonds and interest of which it has had the benefit. It would only be in the case of a consolidation of two or more companies (see 16, act 1864) that the benefits and burdens of the former companies would accrue *in solido* to the successor.

It is confidently suggested that the first section of the act of Congress of March 3, 1869, is not in contravention of, but is in complete harmony with this reasoning and this view. (For the entire act see ante p. 6 of this brief.)

This section authorizes a contract and a transfer—the contract was for the construction and maintenance of a railroad, and the transfer is "of all the rights and franchises, subject to all the obligations," pertaining to the line of railroad from Denver to Cheyenne. Here reciprocity is mentioned. "Obligations" follow "rights and privileges," and grow out of them.

There was no right in the Kansas Company on the 3d March, 1869, to have bonds along any portion of that road. That company had then already obtained all the bonds to which it was entitled under the previous laws. As it could have no more, it could not transfer the right to have bonds to the Denver Company. It did not. The law of 3d March, 1869, section 3, provided that "neither of the companies"

should "be entitled to subsidy in United States bonds under the provisions of this act," and the act must be construed in the light of this prohibition. By neither law nor transfer could the Denver Company have the right to receive United States bonds, as provided in section 5 of the act of 1862, for every mile of its line when completed and equipped according to law; and by neither law nor transfer was any obligation imposed upon the company to redeem bonds or to provide a fund for that purpose out of its earnings. The company got no bonds, and did not assume a liability to pay any. The reciprocal benefit received, and duty incurred, are as clearly indicated in the words "rights and privileges," on the one hand, and the "obligations," on the other, in the act of 1869, as in the more elaborate provisions of the acts of 1862 and 1864, already discussed. A transfer that gave no bonds, and no right to bonds, did not create an obligation to establish a fund to pay bonds at maturity.

The United States, in order to keep itself advised of the condition and earnings of the companies, authorized to receive subsidy bonds, required those companies to make annual reports of the amount of stocks subscribed and paid in, the cost of construction and surveys, the receipts from passengers and freight, the expenditures of the road and fixtures, and the amount of indebtedness and the kinds thereof, &c.; but there is no requirement in the act of 1869, or any other law, that the Denver Company shall make such reports, for it is not, and never has been, liable to account to the United States in respect to its annual earnings, and the United States has no interest in its income.

If the indebtedness of the Kansas Pacific Railway Company of the United States for the $6,303,000 of United States bonds received by it prior to March 3, 1869, is so found by the court below, that the appellee must therein recognize the fact that said bonds are outstanding and unpaid, then we remark:

II.

There is nothing in the act of Congress of March 3, 1869, and the assignment thereunder, to bind the Denver Company to pay the debt of the Kansas Company, or to show that Congress intended it should be held liable for that debt.

This law, in its title and terms, evinces the palpable recognition by Congress of the historical facts existing at its date, and to which its provisions were precisely adapted.

The Kansas Company had then constructed its railroad and telegraph line under the acts of July 1, 1862, July 2, 1864, and July 3, 1866, from the Missouri river, at the mouth of the Kansas river, westwardly to Sheridan, Kansas, 404 miles; and had, before that date, received the subsidy of $16,000 per mile for 393$\frac{5}{6}$ miles of that road, which was the entire pecuniary aid to which it was by law entitled. (Finding IV.)

The city of Denver, Colorado, had then lately risen to importance, but was isolated from the marts of commerce and the lines of railroad transportation. Its population in 1870 was officially ascertained to be 4,759 persons. It had a large and profitable mining business and trade, and the population of the Territory, of which it was the center, had risen to nearly 40,000. [By the census of 1870 it was then 39,864.]

Chicago, Omaha, and St. Louis, not to mention the Eastern cities, were requiring rapid communication with that Territory. The Kansas road had received its subsidy and built its road to within 235 miles of Denver and the Union Pacific road was but 106 miles from that city, at Cheyenne.

Judging from the liberal aid Congress had given the Union Pacific road and branches, it is apparent that roads could not be completed rapidly from Sheridan to Denver, and Denver to Cheyenne, without large expenditures of money. But no more bonds would be granted by the

United States. What beyond this Congress could do, in the line of established policy, it was willing to do and did do. The Denver Company (section 1 of the act) had then already a road-bed graded from Denver to Cheyenne. The Kansas Company had no road, but a right to build one on the same line. What could Congress do? It could relieve the Kansas Company of the requirement to build a road from Denver to Cheyenne, and authorize a consolidation of the interests of the two companies on that line, by authorizing the Kansas Company to assign its land grant and privileges along the route. It could sanction the borrowing of money by the two companies to aid in completing the two roads to Denver, and by such sanction could advertise the money lenders that the United States held a friendly position to the two enterprises, and was aiding them.

These things were done by the law of March 3, 1869, whilst the government and the country at large retained the advantage of having the two roads operated as a continuous line "from Kansas City, by way of Denver, to Cheyenne." The primary intention of said law was "to expedite the completion of railroads to Denver," as stated in the title. The other parts in detail fall into harmonious subordination to that intention. The branch line connection with the Union Pacific road is maintained. The advantages of transportation over the road for Government purposes were probably retained. The claim to a land grant then doubtful was admitted, but no further issue of bonds conceded. The permission given by Congress to State corporations to borrow money, to have due meaning and purpose, was an expression of non-interference by the United States with the loans to be made and the securities to be given therefor. Each company was authorized to mortgage its own portion of said road, "as herein defined," for an amount not exceeding $32,000 per mile. Each was to have patents direct to itself from the United States for the lands granted. The "respective portions of said road, as herein defined," were;

First, the Union Pacific Railway Company, Eastern Division road—extension from Sheridan to Denver; and second, the Denver Company's road from Denver to Cheyenne.

If Congress had intended that by the authorized transfer the Denver Company should immediately thereafter be held liable to contribute part of its annual earnings to pay the $6,303,000 of bonds, and to be liable to redeem those bonds at maturity, this should have been expressed in the law. The facts were well known, and in the mind of Congress, but no such provision is found in the law. If it had been placed there, or intended by Congress, then the Denver Company would have been required to formally accept the provisions of the statute, as was required by the act of 1862, of all companies that were authorized to obtain subsidy bonds. Congress (largely composed of lawyers) did not expect one company to pay the debt of another without an express promise in writing; but the Denver Company filed no acceptance, and was not required to do so.

Again, if the Denver Company became liable for the $6,303,000 of bonds issued before it took the assignment, then the transfer would be manifestly an accruing burden to that company, and an accruing advantage to the United States—something directly hostile to the general policy of aiding the construction of railroads in the distant Territories of the United States. No; Congress did not intend to decoy the Denver Company into a trap, in order to take its fur; nor to bewilder and entrap the persons who should lend money to the company to build the road, and then seize upon the railroad property which their capital had purchased to satisfy the debt of another company existing before the trap was set. It does not seem material whether it be claimed that the debt from the Kansas Company was or was not in any manner made more secure by distributing the $6,303,000 into three parts, which should be proportionate liens on the $393\frac{5}{6}$ miles subsidized—the extension to Denver, and the Denver Company's road—or was

stretched like an elastic band over each and every mile of the entire line from Kansas City to Cheyenne, or whether the Denver Company be charged with an individual joint liability for the debt, not accompanied by any mortgage lien: all are alike hostile to the honorable intentions of Congress entertained March 3, 1869, and spread on the surface of the statute, to expedite the completion of railroads to Denver. If any such liability to the United States had been cast by the law and the transfer upon the Denver Company, that company would have been unable to secure the means to do what Congress desired to aid and foster by its enactment, viz., hasten the completion of a railroad from Denver to Cheyenne. And if we glance at the legal consequences of a failure to redeem bonds at maturity, as declared in section 5 of the act of 1862, which provides that "on the refusal or failure of said company to redeem said bonds or any part of them when required to do so by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, &c., &c., "may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States," it is made clearer still, if possible, that Congress did not intend to impose such a penalty upon a corporation existing under the laws of a Territory, a corporation that had never received a United States bond or a dollar of pecuniary aid from the Government, but had been encouraged and authorized by Congress to borrow money on its own property and credit, to build its road without the aid of a bond, although bonds had been granted to the Union Pacific Road for aid in building that part of its road with which the Denver Company's road was to unite.

It is respectfully submitted that great significance is to be given to the fact that at the date of the act of March 3, 1869, all the bonds which the Kansas Company could be entitled to obtain had been delivered to that company, and the act

of that date did not contemplate the transfer of the avails of those bonds or any part of them to the Denver Company. But the law in spirit says let by-gones be by-gones, and the United States will give such aid to the companies by this act as will enable them in the future expeditiously to complete two railroads to Denver—one connecting that city with St. Louis, Mo., and the other with Chicago and Omaha. The act expressly provides for a "contract" between the Kansas and Denver Companies, but it is not a contract of consolidation, nor a contract of partnership, nor a contract subordinating one company to the other. On the contrary, any construction of the law that would authorize the Kansas Company to operate the road or fix the rates of the Denver Company was expressly prohibited. (Section 2d.)

The contract was to be in subordination to the object and intention of Congress expressed in the law, and to provide for the construction, operation, and maintenance of a railroad in the immediate future, by the Denver Company. It was to contain no agreements about the existing debts of the Kansas Company. The latter company could not impose rates of fare, and manage the Denver road in a manner for its own profit, so as to aid in the payment of its debts out of the earnings of the Denver Company. The intention of Congress in this particular clause of the law appears to be that the Denver Company *shall not be compelled to contribute in any way to pay the existing debts of the Kansas Company.*

It is not needful in this discussion to explain the exact force and effect of the words in the 1st section of the act of 1869, taken in connection with the Kansas Pacific Railway Company, and its railroad and telegraph, as provided for by previous laws. Due effect can be given to that section as applicable to the construction and operation of the road as a part of the system of Pacific railroads. It is enough for us in this cause to show that said section does not sanction the claim of the United States in this case, that the Denver Company

has thereby been made liable for the bonds that had been issued to the Kansas Company, before its enactment.

III.

The Denver Pacific Company cannot be held liable to pay the bonds, or any part of the bonds received by the Kansas Pacific Company, because the lien of the United States to secure the repayment of the bonds is limited to the identical road and equipments in consideration of which said bonds were issued, viz., the $393\frac{5}{8}$ *miles of road lying immediately west of the Missouri river.*

I understand that the principle of interpretation to be applied in construing the Pacific Railroad acts has been settled by this court in the case of The United States *vs.* The Union Pacific R. R. Co., 91 U. S., p. 72, and that said acts are to have a fair interpretation. The true intention and just meaning of Congress at the time of the enactments is to be sought:

"The primary object of the Government was to advance "its own interests, and it endeavored to engage individual "corporations as means to an end, the securing of a road "which could be used for its own purposes. The obliga- "tions, therefore, imposed on the company incorporated to "build it must depend on the true meaning of the enact- "ment itself, viewed in the light of contemporaneous his- "tory." P. 81.

"The act * * * must be considered in the nature of "a proposal to enterprising men to engage in the work. * * "There was no certainty that capital could be enlisted. If "enlisted at all it could only be on conditions which would "insure, in case of success, remuneration proportionate to "the risk incurred." P. 82.

We are to interpret the act now as it was intended to be understood when passed.

It provided aid from the United States to corporations therein named, to enable said corporations to build railroads, which when constructed and equipped according to the provisions of the act would consummate a comprehensive

plan—a main line from the one hundredth meridian west of Greenwich to the Pacific ocean, with branches from frontier points on the Missouri river—one branch from the mouth of the Kansas river through Kansas to intersect the main line not further west than the initial point of the main line. (See sec. 9.)

One from St. Joseph, Mo., by Atchison, Kansas, to connect with the said road through Kansas, (sec. 13,) or with the Iowa branch.

One from a point on the western boundary of Iowa to the initial point on the one hundredth meridian. (Sec. 14.)

One from Sioux City, Iowa, to connect with the main line or the other Iowa branch, not further west than the one hundredth meridian. (Sec. 14.)

The grant of lands extended on all the said roads for their entire lengths, except that on the branch from St. Joseph, Missouri, it was limited to one hundred miles. (Sec. 13.)

The land grants followed the roads, and the granted lands contiguous to the roads were to be obtained as the roads were completed according to law. (Secs. 3 and 4.)

Sections 5 and 6, which are principally drawn in question in this discussion, are as follows:

"SEC. 5. *And be it further enacted*, That for the purposes herein mentioned the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States Treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have

been paid by the United States, the issue of said bonds and delivery to said company shall *ipso facto* constitute a first mortgage on the whole line of railroad and telegraph, together with the rolling-stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds, or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities and appurtenances thereto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States: *Provided*, This section shall not apply to any part of any road now constructed.

"SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service:) and *all compensation for services rendered* for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall be annually applied to the payment thereof."

Section 16 authorized two or more of the companies to consolidate, and to build the roads required upon the terms and conditions prescribed.

Section 17 provided that, to secure speedy completion of

any road or roads, in case of delay and default of the company, the United States might proceed with the work, and take possession of the road, and reimburse themselves for expenditures; also, that on failure to complete a road from the Missouri River to the navigable waters of the Sacramento by July 1, 1876, "the whole of all of said railroads "before mentioned, *and to be constructed* under the provisions "of this act," together with their property of every kind, "shall be forfeited and taken possession of by the United "States."

This section also provided for the retention in the Treasury of 25 per centum of the bonds of the United States, to be delivered for any and all parts of the roads east of the 100th meridian, &c., "*until said road and all parts thereof pro-*"*vided for in this act* are completed," and 15 per centum of the bonds deliverable for the road between the 100th meridian and the west foot of the Sierra Nevada Mountains, "*until* the whole of the road provided for in this act is fully "completed."

[This was afterwards repealed, but was a part of the scheme enacted July 1, 1862.]

All the companies named in the act were required to assent to its provisions, in proper form, before receiving its benefits, and to make annual reports to the Secretary of the Treasury.

Let us glance, then, for a moment, at this scheme as it stood upon the 2d day of July, 1862.

All the companies mentioned were to build railroads and telegraphs in the future, and were to receive subsidies in bonds for that purpose, but a road then built was not provided for, could not be taken into the family by adoption, and have its quota of bonds per mile.

The routes of all the roads were indicated generally. Their lengths could not exceed the reasonable distances to be traversed between the required termini. The Kansas

Company's road could not be longer than requisite to connect with the main line on the 100th meridian.

The St. Joseph extension, (sec. 13,) upon filing its assent to the act, could extend its road, "upon the same terms and "conditions in all respects, for one hundred miles next to "the Missouri River, as are provided in this act" for the Union Pacific roads.

This is peculiar. That extension could have lands and bonds for only one hundred miles next the Missouri River. It might (see same section) connect with the branch from the western boundary of Iowa, with the consent of the Kansas Legislature—but could have no more lands and bonds than for the 100 miles—not only because of the limitation, but because the granting power of the section was exhausted on the 100 miles, and the "*terms and conditions*" of the act would go no further. Whatever other road the Hannibal and St. Joseph Company might own or build, this only was to have the benefits and assume the conditions of the grants—this only was to be liable for bonds delivered—this only was liable to forfeiture and seizure under sections 5 and 17.

So, also, as to a road then built. It could have no bonds, and could not be seized by the Secretary of the Treasury upon the failure of any company to redeem bonds at maturity.

What road, then, is liable for such bonds, and to such forforfeiture and seizure. It is the road, and the road only, "in consideration of which said bonds may issue." Under the act of 1862, such road, in each case, was distinctly designated. It was to have patents for lands and quotas of bonds (secs. 4 and 5) as fast as it might be completed in sections—and "the whole line of railroad and telegraph," in each case, as each was specially defined, was to have bonds and lands.

So, in sec. 17, if the company should fail in building and

keeping up its road, Congress might sequester its earnings, to repay for expenditures of the United States arising from the company's default: and though by sec. 5, bonds were to be delivered as the road might be completed in sections: yet, by sec. 17, a per centum of the bonds might be withheld, "until said road and all parts thereof provided for in "this act are entirely completed, and" (stated elsewhere in the same section) "until the whole of the road provided for "in this act is fully completed." As all parts of the roads "provided for in this act," as above explained, received bonds, this provision was applicable to the whole of each road; but as to any road not "provided for in the act," though owned and built by the same company, it could not be applied.

The expressions here the "said road," and "the whole of the road provided for in this act," are of equivalent meaning with those in section 5—"the whole line of the railroad and telegraph," &c., "in consideration of which said bonds may be issued." They refer to the road as a whole, which Congress subsidized, in its whole length, by bonds given, mile for mile, though the bonds were delivered in installments upon completion of sections of road. It was not the intention of Congress to assert a lien of bonds issued, upon any road or part of a road to be built without their aid, or to enforce forfeitures of any road or railroad property which the bonds had not aided to establish.

No lien of issued bonds is declared upon the land grants, and no liability to redeem bonds is declared because of the receipt of grants of land: and had any company refused to take bonds, and proceeded to build a road by the aid of the land grants alone, it would not be within the scope of this statute, to compel such company to relinquish its half earnings, or pay to the United States its five per centum. What is intended to be a contribution to pay a debt, is not exacted where no debt has been created.

I here, by consent, adopt a paragraph from the argument of Judge Sanderson, in the Kansas Pacific Case, No. 418 of this term of the Court.

Commenting upon sections 5 and 6 of the act of 1862, he says:

"All through sections five and six the same road is referred to, as appears from the use of the word '*said.*' The only road previously described in the act is the one which the Union Pacific Company is authorized to build, which is described in the first section of the act, and extends from a certain point in Nebraska to the western boundary of Nevada. So it is clear that as to the Union Pacific Company, the road intended in the five per cent. clause is the road which that company was authorized to construct and operate by the terms of that act, 'and in consideration of which the subsidy bonds were issued.' This is true of every other company named in the act. The road it was authorized by that act to construct and operate, 'and in consideration of which the subsidy bonds were issued,' is the road which it has undertaken to keep in repair and use, &c., and it is of the earnings of that road, and that road only, that it has undertaken to pay the United States five per cent.

"The intention of Congress was to secure a lien upon the identical road which the subsidy bonds aided in building. This is conclusively shown by the fact that they were to be issued and delivered *pari passu* with the construction of the road, and were to constitute a first mortgage on the whole line of the road *in consideration of which* they were so issued and delivered; that is to say, for the *construction* of which they were so issued and delivered. The mortgage was to cover whatever road the bonds helped to build. It was not intended to cover any other road; and whatever road the mortgage covered was to contribute five per cent. of its net earnings, annually, to the payment of the loan secured by the mortgage. The language of the five per cent. clause is 'at least five per cent. of the net earnings of *said road*,' &c., not five per cent. of the net earnings of any other road, or of the company, but of the road provided for in *that act.*

"None of the provisions of this act or contract were intended to apply to any roads other than those therein provided for. Congress proposed to aid in the construction of

certain roads; on those roads it proposed to take a mortgage to secure the payment of moneys contributed towards the cost of their construction; over those roads it proposed to secure certain advantages in the matter of transportation; to those roads it did not propose to pay any money for transportation, but to apply all moneys which they might earn in that way to the payment of the subsidy bonds; and, in addition, and for the same purpose, it further intended to exact five per cent. of their net earnings. With other roads, constructed under other acts, Congress did not, by the provisions of this act, propose in any manner to interfere. Nor did Congress intend to fasten a lien upon any road or part of road to which no subsidy bonds were issued, notwithstanding it might be constructed under the provisions of this contract. This is the only sensible interpretation of which the language of the contract is susceptible.

"The foregoing sections apply to every company named in the contract, and when they are read with reference to any particular company the road intended is the road which that company is authorized to construct, and in aid of which subsidy bonds were issued to it."

So far as the Kansas Company's road is concerned, the words, "the whole line of railroad and telegraph," found in sec. 5, of the act of 1862, at the date referred to, designated the whole line of that road, as defined in, and existing under, that act, and every mile of it entitled to the subsidies granted in said section five. They did not mean or refer to any other road or part of a road.

Such being the meaning, in 1862, of the whole line of road, &c., in consideration of which bonds may be issued, we inquire if any change in this meaning arises out of subsequent legislation in regard to the route of the Kansas Pacific Branch road.

The general provisions of the act of July 2, 1864, enlarging the grants in the prior law, inured to the benefit of the Kansas Company, as one of the branch roads.

In section 12, this company is named, and it was therein required either to build its road by way of Leavenworth, or

to build a branch from Leavenworth to Lawrence. For the branch, it was not to be entitled to bonds, &c.; it could have no lands—for the road ran through Indian reservations. In case of default of the Union Pacific Company to build, the Kansas Company, after reaching the 100th meridian, was authorized to continue to build westwardly to meet the Central Pacific road.

By section 9, the branch roads were authorized to connect with the main line of the Union Pacific Road to the westward of the 100th meridian—

"And in aid of the construction of so much of its road and telegraph line as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits, and be subject to all the conditions and restrictions of this act: *Provided further*, however, That the bonds of the United States shall not be issued to such company for a greater amount than is hereinbefore provided, if the same had united with the Union Pacific Railroad on the one hundredth degree of longitude; nor shall such company be entitled to receive any greater amount of alternate sections of public lands than are also herein provided."

The Kansas Company did not build a road under this provision in the act of 1864. The location of route to the 100th meridian, there to unite with the main line, was not changed under this law.

In section 11, we find the following:

"*Provided, also*, That no land granted by this act shall be conveyed to any party or parties, and no bonds shall be issued to any company or companies, party or parties, on account of any road or part thereof, made prior to the passage of the act, to which this act is an amendment, or made subsequent thereto, under the provisions of any act or acts other than this act, and the act amended by this act."

This provision is similar to one in the act of 1862. It shows the continued intention of Congres to confine the bond subsidy strictly to the roads built under and after the

act of July 1, 1862, and we argue, to the specific roads defined in the act of 1862; and so far as the Kansas Pacific road was referred to, it meant a road from the Missouri State line to the trunk line at the 100th meridian.

Section 10 of the act of July 1, 1864, provided:

"That section five of said act (of July 1, 1862,) be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road as provided in this act and the act to which this act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines, to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time and maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively; and the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this act is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word 'forty,' and inserting in lieu thereof the words 'on each and every section of not less than twenty.'"

By sec. 1, of an act of 3d March, 1865, (13 Stat. 504,) the Kansas Company, (with others,) was authorized to issue its first mortgage bonds for 100 miles "in advance of a continuous completed line of construction."

It will be noticed, however, that the line of this road had then been located to connect with the trunk line at the 100th meridian, and that all these provisions of law applied to that line—and that they could apply to the line as afterwards by law authorized to be changed only as such subsequent law should provide and determine.

The change of route to the Smoky Hill river was made under the act of July 3d, 1866, which strictly limited "the amount of bonds of the United States" to the length of line to the 100th meridian, "as now required by law." No Government bonds and no first mortgage bonds, as provided in Sec. 10 of the act of 1864, could be issued for this company for any greater distance in miles of a continuous completed line, than the distance to the 100th meridian, viz.: The 393 $\frac{15}{16}$ miles named in the findings.

The act of 1862 required acceptance thereof by the company, but no such requirement is found in the acts of 1864, and March 3d, 1865. These laws were for the benefit and relief of the company, to aid in the speedy completion of the road to the 100th meridian. It was not the intention of Congress to impose enlarged burdens and obligations on the company, and the requirement of acceptance was not made. If the company should not choose to issue first mortgage bonds on the road subsidized by the Government, all the better for the United States, as its security would be enhanced.

It is argued that the lien of the United States bonds extends to all the line of road built under the acts of 1862 and 1864, that may be in existence after the bonds become due and the forfeitures for non-payment may be enforced. This may be true and our argument not be shaken, because it does not appear from the record that the Kansas Company built any other line of road under the acts of 1862 and 1864, than the 393$\frac{15}{16}$ immediately west from Kansas City. It does appear in the findings that beyond that point, (or its equivalent, Sheridan, Kansas,) the road was built under another and subsequent law of Congress, the act of 3d March, 1869, hereinafter discussed.

The act of Congress of July 3d, 1866, allowed the Union Pacific Company to build its road without reference to the initial point on the 100th meridian.

The first section of the act of 1866, which relates exclusively to the Kansas Pacific road, (14 Stat., p. 79,) is as follows:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Union Pacific Railway Company, Eastern Division, is hereby authorized to designate the general route of their said road and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: *Provided*, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their line with the Union Pacific Railroad on the one hundredth degree of longitude, as now required by law: *And provided further*, That said company shall connect their line of railroad and telegraph with the Union Pacific Railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado.

* * * * *

This act is amendatory of the acts of July 1, 1862, and July 2d, 1864. It was passed in 1866—and this section relates to the Kansas Pacific Road alone—it authorized a change of route, and directed a withdrawal of land. New and additional privileges are given, but there is no new or additional burden imposed on the company or its road. Its right to bonds for the $393\frac{15}{16}$ miles, afterwards measured, was recognized—an amount of bonds certain, for a length of road certain—none for length beyond.

This law is emphatic in what it does not say. Its silence speaks, and speaking says: The two parties may stand to each other hereafter on another line of road—for a given distance on the new line—in respect to bonds, as if the Kansas Road had connected with the Union Pacific on the

100th degree of longitude, viz: a quantity of bonds certain will be issued for, and secured upon a length of road certain. This leaves us where we were under the act of 1862—and does not change the meaning of the words in section 5, of the last-named act: "The issue of said bonds and delivery to the company, shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind *and description, and in consideration of which said bonds may be issued.*"

But when we examine the later law of March 9, 1869, (ante, p. 6,) it is clear that Congress at that time, settled the doubt, if any there was, as to the quantity of lands, and the lien of the United States bonds, in favor of the Kansas Company.

At that date the Kansas Company had built 404 miles of road, and received its full quota of bonds on $393\frac{5}{16}$ miles. The bonds were delivered in instalments as the road was completed. They were intended to aid the identical $393\frac{5}{16}$ miles, on account of which they were issued. The rate of subsidy was on a mileage basis. The road thus far, 404 miles, had been built with aid of the smallest rate of subsidy, extending from the settlements immediately west of the Missouri river, into the American desert, to a fort on the frontier named after one of our most pushing and advanced military men. If it could go only to where his name was a watchword with the aid of subsidy, how was it to advance into the Desert without aid? Congress desired this road completed as far as Denver, and came again to its assistance. Section three of this law authorized this company to "mortgage" its portion of said road, as herein defined, "for an amount not exceeding $32,000 per mile, to "enable the company to borrow money to construct the "same," but denied it any United States bonds. Of bonds it already had its full quota, as originally provided in the act of 1862, and had built all the road required of it by the

acts of 1862 and 1864, and here construction came to a stand till other assistance was afforded. The assistance given was authority to borrow money on the unconstructed portion of road from Sheridan (or the 393$\frac{5}{8}$ mile post, which is practically the same thing,) to Denver—$32,000 per mile—the same amount per mile borrowed on first mortgage bonds, and by Government subsidy, along the then completed and accepted portion. The fair construction of the authority to borrow money on mortgage of the extension to Denver remaining to be built, is a negative of the proposition that the Government then held a mortgage lien on the same portion of road, to secure $6,303,000 in bonds issued for building a portion then already completed. In any other view, the authority to borrow thus given by Congress to a State corporation is wholly useless, for any State railroad corporation had authority to borrow money to build its road, and it generally borrows more than it can afterwards pay.

The authority to borrow money on mortgage to build a railroad is, in one respect, peculiar. The property to be held as security has no existence before the law, but the money borrowed is to create the property which is to become the thing pledged to secure repayment of the loan. If, then, Congress, in authorizing this loan and mortgage on the extension from Sheridan to Denver, enacted this law in full expectation of having a property created upon which the previous issue of $6,303,000 in United States bonds would be a prior lien, its proposed aid would have been delusive. If the company was authorized to rely on private capital to borrow means to build its road, Congress would be intending to seize and hold that capital for its own security, and the parties loaning the money would be investing in a faro bank. Much could go in, but little or none come out of the enterprise.

The true effect of this authority to borrow was, on the contrary, and was intended by Congress to be to encourage the company to rely on private capital, and not on subsidy

bonds, for constructing the portion of road then unbuilt; and to advertise to capitalists that a veritable mortgage could be executed thereon by the company to secure its loans—a mortgage which pledged the title of the property to be acquired with the borrowed money, and made it liable to sale for the benefit of the lenders should the company fail to redeem the loan. This much is implied by the use of the word "mortgage," as used generally both in ordinary speech and in national and State jurisprudence.

It is obvious that Congress in 1866 or 1869 could not be understood as intending to do anything to change the then existing security of the first mortgage bondholders for $16,000 per mile, as authorized in the act of 1864. Their lien was limited in terms to the portion of road on which subsidy bonds of the United States were issued. That of the new mortgage must be confined to the balance of the line to Denver. It could not be intended to cover the entire line between Kansas City and Denver, and to be placed under the same security as the first mortgage bonds already issued. That would impair the value of the first mortgage bonds. The private parties lending money to this company took, evidently, their liens on particular portions of road, and as to the $393\frac{5}{16}$ of completed road, the first mortgage bondholders and the United States could have no additional lien or security, though the interests of both lay in the direction of a completion of the line to Denver, which would render the first $393\frac{5}{16}$ miles more profitable and valuable.

It seems to be clear that by the acts of 1866 and 1869, it was the intention of Congress to *benefit and aid* the Kansas Company, not to burden and embarrass it in building a road upon the new line. The Government lost nothing, but gained its avowed object—to "expedite the completion of railroads to Denver, in Colorado."

Respectfully submitted,

HENRY BEARD,
For the Denver Pacific R. W. Co.

Oct Term 1878
No 781

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE UNITED STATES,
Appellant.

AGAINST

THE DENVER PACIFIC RAILWAY AND TELEGRAPH COMPANY,
Appellee.

J. P. USHER,
Attorney for Appellee.

SUPREME COURT OF UNITED STATES.

THE UNITED STATES,
Appellant,

AGAINST

THE DENVER PACIFIC RAILWAY AND TELEGRAPH CO.
Appellee.

This is an appeal from a judgment in the Court of Claims in favor of the appellee, for $58,260.00, rendered June 3, 1878. The action was upon *quantum meruit* for the transportation of mail over the railroad of the appellee. No objection can be made that the service was rendered, or to the value of such service. The judgment is correct in all respects, unless in point of law the appellee is, by force of the acts of Congress, bound to pay the debts of the Kansas Pacific Railway Company.

Both the railroad companies were duly incorporated, the Kansas company by virtue of an act of the Legislature of the Territory of Kansas, and the Denver company under the laws of the Territory of Colorado, date not found. *See first and second findings, page 27 record.*

The provisions of the acts of Congress affecting the Kansas company will, in the course of this argument, be referred to. The act of Congress affecting the Denver Pacific company, and which it accepted, is *Exhibit B, page 5 of the record.*

By virtue of the foregoing act of Congress the agreement was entered into, March 19, 1869. *Page 28 of the record.*

The claim of the United States is that under that act of Congress, and the agreement, the railroad of the Denver Pacific company was burdened with the debt of the Kansas Pacific company to the United States, on account of bonds issued to the Kansas company, admitted by *paragraph 5 in the petition, page 1*, to have been received by the Kansas company, and that under section two of the act of March 3, 1873, the Secretary of the Treasury was justified in withholding payment to the Denver Pacific company.

That section is as follows:

SEC. 2. That the Secretary of the Treasury is directed to withhold all payments to any railroad company and its assigns, on account of freights or transportation over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per cent. of net earnings due and unapplied, as provided by law; and any such company may bring suit in the Court of Claims to recover the price of such freight and transportation; and in such suit the right of such company to recover the same upon the law and the facts of the case shall be determined, and also the rights of the United States, upon the merits of all the points presented by it in answer thereto by them, and either party to such suit may appeal to the Supreme Court; and both said Courts shall give such cause or causes precedence of all other business.

The trouble with the Kansas Pacific company began in consequence of an opinion of the Attorney General, December 9, 1870, found on *pages 8 and 9 of the record*. This was temporarily obviated by the act of March 3, 1871, *16 Statutes at Large, page 515*, which provided that "the Secretary of the Treasury is hereby directed

to pay over to the Pacific railroad companies . . . . performing services for the United States, one half of the compensation at the rate provided by law for such services."

Under this act payment was made for transportation until the act of 1873, before mentioned, when the Attorney General advised the Postmaster General that the act of 1873 precluded him from making further payment to the appellee for the transportation of mails (*record, Exhibit D, page 7*), and upon refusing, in consequence of that letter of instructions, this suit was brought.

It is not pretended that the appellee ever received any bonds from the Government, and the only question is, do the act of Congress of March 3, 1869, and the agreement of the two railway companies, made in pursuance of that act, create a liability on the part of the Denver Pacific company to pay the debt of the other company?

An examination of this question will require a consideration of the status of the Kansas Pacific Railway Company in relation to the government, and of this company in relation to the former.

The original status of the Kansas Pacific Railway Company in its relation to the government was determined by the provisions of the act of July 1st, 1862 (*12 U. S. Stats., 489*), accepted by the company, with the consent of the legislature of Kansas. But as little or nothing was done under this first act, it is unimportant to consider its effect, or the nature of the contract arising on its acceptance.

Under the amendatory act of July 2, 1864 (*13 U. S. Stats., 356*), the Kansas company came into active existence, and it will be useful therefore to consider the rights and liabilities that it acquired and assumed by the acceptance of that act.

Such acceptance created an executory contract between the parties, the terms of which may be succinctly stated as follows:

The company undertook the following obligations:

1. To build a railroad and telegraph line from the south side of the mouth of the Kansas river to a point of connection with the Union Pacific on or west of the 100th meridian, by way of Leavenworth, Lawrence and Topeka, or with a branch from Leavenworth to Lawrence. *Sec. 9 of '62; Secs. 9-12 of '64.* The road to be of first class construction (*Sec. 4 of '62*) and to be completed, the first hundred miles within three years of the acceptance of the act of '62, and one hundred miles every year afterwards *Sec. 10 of '62; Sec. 5 of '64.*

2. To keep it in good repair and operate it as a part of the system of Pacific railroads. *Sec. 6 of '62.*

3. To give the government preference in the carriage of troops and munitions of war upon it. *Sec. 6 of '62.*

4. To transport persons and material for the government at rates not higher than those charged to private persons. *Sec. 6 of '62.*

5. To repay the balance of money lent by the government and interest at the maturity of the loan, namely in thirty years. *Sec. 6 of '62.*

6. To reduce the loan before maturity.

By allowing the government to retain one-half the charges for transportation. *Sec. 6 of '62, Sec. 5 of '64.*

The government undertook as its obligations:

1. To lend $16,000 per mile on statute mortgage, to be advanced in instalments, payable on completion of each section of twenty miles, and repayable as above stated (*Sec. 5 of '62; Sec. 6 of '64*). But the total amount of the loan, in case connection was made with the Union Pacific west of the 100th meridian, not to

exceed the amount to which the company would have been entitled if such connection had been made at that point. *Sec. 9 of '64.* And nothing to be lent on account of any branch from Leavenworth. *Sec. 12 of 1864.*

2. To grant on like completion the odd sections of the public lands within twenty miles on each side of the railroad. *Sec. 3 of '62; Sec. 4 of '64.*

The first important modification of the contract as stated above was by the resolution of May 7, 1866 (*14 U. S. Stats., 355*), which fixed the 27th day of June, 1866, as the date by which the first one hundred miles should be completed, and from which the years allowed for the completion of each successive hundred miles thereafter was to be computed.

Next by the act of July 3d, 1866 (*14 U. S. Stats., 79*), the company is allowed till December 1st, 1866, to designate its route, which, however, is required to connect with the main line not further west than fifty west of the meridian of Denver. It appears, therefore, that this act left the company at liberty to select any route that would make a connection with the Union Pacific between the 100th meridian and fifty miles west of the meridian of Denver, but restricted its existing right to push to the westward of the limit indicated. It further provides that the lands along the entire line located are to be reserved from sale, but the restriction on the amount of the loan contained in the act of 1864 is re-enacted.

Under this act the company located its road west to Denver, and the public lands were withdrawn as provided. And under these relations to the government the greater part of its road was built (Kansas City to Sheridan, 404 miles) and it received all the pecuniary assistance to which it was entitled. (*Petition, par. 5.*)

Thus at the time of the passage of the act of March 3, 1869 (*Exhibit B*), which is the foundation of claimant's rights, there remained of the entire road of the Kansas Pacific to Cheyenne, over 700 miles in length, over 300 still to be constructed, (Sheridan to Denver, 234 miles; Denver to Cheyenne, 106 miles; in all 340 miles), while that company had obtained all the advances the government had agreed to give, and to aid it in the completion of the remainder had but a claim to a grant of the public lands. It is obvious that the exhaustion of the government subsidy rendered the construction of the remaining part of the road a more difficult task than the progress so far made, and that it was for the interest of both parties that the road should be finished,—of the government, so that connection would be made with the Union Pacific and the road brought into the general Pacific system—of the company, so that the legal consequences of non-completion of its road should be avoided, and the part already constructed utilized for trans-continental traffic.

Under these circumstances the act of March 3, 1869, which is now presented for interpretation, was passed, and the claimant enters into conventional relations with the United States. The act permitted the Kansas Pacific Company to transfer to the claimant, an existing Colorado company, which had a roadbed already located and graded between the two points, its right to build a road between Denver and Cheyenne, and "all the rights and privileges, subject to all the obligations pertaining to said part of its line," directed the former company to extend its railroad to connect with claimant's road, at Denver, authorized each company to borrow money on mortgage, at a rate not exceeding thirty-two thousand dollars per mile, and granted or con-

firmed to each the odd sections of public lands within twenty miles on each side of their roads.

A few days after, the transfer authorized by the act was made (*Exhibit C*), and in the course of the following year both roads were completed.

What then is the status of the claimant in relation to the government? We contend that no pecuniary obligations of any kind subsist between them, and that the claimant is liable neither directly as a debtor or surety, or indirectly as assignee of property subject to a lien, to pay anything towards the debts of the Kansas Pacific. (*Par. 10*).

The Attorney General held that the claimant was bound to carry the mails, and that the compensation payable in respect of such carriage was to be credited on the debt due by the Kansas Pacific to the government.

Taking Mr. Pierrepont's opinion in connection with the earlier one of Mr. Akerman, on which it was based, it appears he holds every obligation of the Kansas Pacific, pecuniary or otherwise, to be equally incumbent on the Denver Pacific, and thus the latter would have to apply a portion of its earnings towards the payment of the former's debt, and be liable to be taken possession of by the government if that debt was not discharged at maturity.

We frankly confess that such a construction, which seems but a logical deduction from the ground taken by Mr. Pierrepont, seems to us so monstrously unjust to the stockholders of the claimant, that a mere statement of it suffices for its refutation.

The vital phrases, on the construction of which the controversy between the parties turns, are the expression "subject to all the obligations *pertaining to said*

part of its line," in the act of 1869, and the direction "to withhold all payments to any railroad company *and its assigns*——to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been reimbursed, together with the five per centum of net earnings due and unapplied as provided by law," in the act of 1873.

Their interpretation calls for the examination of two questions.

First. What were the obligations pertaining to the part of the road of the Kansas Pacific lying between Denver and Cheyenne on March 3, 1869?

Second. What is an "assign" of a company which had received bonds from the United States? Is the Denver Pacific Company an assign of the Kansas Pacific within the meaning of the act of 1873?

We contend that the obligations pertaining to the road between Denver and Cheyenne, were not all the obligations of the company to the United States, but only those which directly affected the property as well as the contracting party, and were in the nature of a lien or servitude upon the property itself; that although the Kansas Pacific corporation might be under a personal obligation, enforcible by action or set off, to pay or apply half charges for transportation, of the entire railroad belonging to it, to the liquidation of its debt to the government, yet such obligations only followed the property in the hands of a transferee to the extent to which the lien to secure them existed, and that a lien existed for the pecuniary advances only upon the portion of the road in consideration of the construction of which the advances were made.

Such a view assumes that the Kansas Pacific could transfer or assign its road in parcels, and whether this be true as a general rule or not is immaterial, for clear authority is given by the government, the other contracting party, for assignments of its original road, in at least four fractions.

First. The transfer of its franchise or right to build that part of its road from Denver to Cheyenne, and the separate mortgage of that part of the road, is directly authorized by the act of 1869.

Second. The power to mortgage the portion of the road of the Kansas Pacific consisting of the extension from its terminus as existing on March 3, 1869, to Denver, given by the act of that date, necessarily contemplates the contingency of a sale under foreclosure of such portion, if the loan so authorized were not paid.

The word mortgage (*mortuum vadium*) as used in the prevailing jurisprudence of the States at the present day, means a lien upon realty with the right to judicial sale on foreclosure; and even in the earlier administration of equity in England, a mortgage carried with it a right to a strict foreclosure, or judicial forfeiture, by which the rights of the mortgagor might be wholly divested, and was thus the opposite of a vifgage (*virum vadium*), which could not divest the ownership of the borrower, but merely gave the lender the perception of the rents and profits until his loan was repaid.

It is obvious that these bonds could not be secured by the same mortgage as that securing the $16,000 per mile of first mortgage bonds, authorized by the act of 1864. The government could not, without impairing the obligation of the original contract securing the $16,000 per mile first mortgage bonds, even had such been the intention of the framers of the act, water

down the security of the original mortgage bonds issued on 400 miles of road at the rate of $16,000 a mile, by a further issue under one and the same security at the rate of $32,000 per mile on 200 miles. Indeed, the language of the act of 1869 is unmistakable. It does not purport to authorize a further issue of bonds under an existing security, but a new mortgage of the extension defined. It is also obvious that the lien of the $16000 per mile first mortgage bonds did not extend over the whole of the company's railroad, but only over the number of miles in respect of which they were issued. If their lien extended over the whole road, the government could not of course release it, without the bondholders' consent, over the part uncompleted on March 3, 1869, so as to authorize another mortgage of that portion.

Nor does there seem room for any possible discussion as to whether the liens of the mortgages authorized by the act of March 3, 1869, were paramount to that of the government. It has been sometimes contended that the lien of the government extended over the whole road, subject only to the prior lien of the $16,000 per mile first mortgage bonds. Such a position is clearly untenable. The act of '64 contemplated a first mortgage to third persons, (subject to the retention of half-transportation charges) and a second to the government. The rate of subsidy was fixed on a mileage basis. Now the act of 1864 authorized the Kansas Pacific and the other branches of the system to extend indefinitely westward, and yet restricted the loan by the government to an amount computed on the length of their roads to the initial point (in case of the Kansas Pacific, under 400 miles), and it restricted the amount of first mortgage bonds to an amount not exceeding that of the govern-

ment bonds. It could not be expected that a further extension westward into what was then styled the American desert would render the construction of the road less expensive, and yet such an interpretation would deprive the company of any power to raise money for the extension of its road as soon as the part for which a subsidy was granted was finished. Had any possibility of such a construction ever been even suspected by the capitalists of the country, when the government subsidy was exhausted no further funds could possibly have been raised on a third mortgage, subject to prior liens of the first mortgage bonds and of the government, and the road would be unfinished to this day.

On the other hand, the contention that the lien for the sum advanced by the government to those roads which received assistance for part only of their line, is confined to that part of their line, is more consistent with the exact language of the act of 1864, by which the lien is given. It reads: "The issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, *and in consideration of which said bonds may be issued.*" The expression "on the whole line" was intended to exclude the idea that each instalment was a separate lien on the forty mile section in respect of which it was issued, and to cover the whole loan by one single lien, which, however, was only to extend over the part of the railroad in respect to which issues of bonds were made. Even in the act of '62, aid limited to 100 miles only was given to the extension of the Hannibal & St. Joseph Railroad, and as all the aided roads except the Union

Pacific were State corporations, nearly all having power to make extensions or construct branches of their road entirely outside of the Pacific system, some limitation of the government lien to the length of railroad in consideration of which it was given, was not only appropriate, but necessary.

On the opposite theory the absurd consequence ensues that the more a corporation relied on private enterprise, the more hardly it was treated by the government. If the Kansas Pacific constructed its road to the initial point on the main stem, a length of about 400 miles, it was to receive an advance on second mortgage at the rate of $16,000 per mile, subject to a first lien of like amount, but if it built a road further west of over 700 miles, it was only to receive the same amount, or an advance at the rate of some $8,000 or $9,000 per mile, with power only to create a prior lien not exceeding the amount of the government bonds. In the case of the Kansas Pacific, the total amount of capital raised by these issues as actually made or purporting to be made by the company was, in round numbers, six millions of first mortgage bonds on the subsidized portion of about 400 miles, six millions of second or government bonds on the same portion, six millions on first mortgage of the extension to Denver or unaided portion, over 200 miles more, and upwards of three millions on the part from Denver to Cheyenne. Can it be a reasonable construction of the act that would give the first six millions and the government bonds a lien over the entire road, leaving the other nine millions secured by a third mortgage only? There is nothing whatever in the act to force the adoption of such an oppressive construction.

Third. The length of road, therefore, in respect of which government aid was given must have, at the date of the act of 1869, been deemed to be mortgaged by itself, and therefore liable to separate sale and foreclosure.

Fourth. And similar considerations show that the Leavenworth branch, constructed without government aid, was not subject either to the lien of the $16,000 per mile bonds or that of the government, and that it could be mortgaged by the company under the general powers given to its State charter.

And the fact that the government owns the equity of redemption of a mortgage does not deprive the mortgagee of the rights the contract gives him of foreclosure and sale. *Elliott v. Van Vorst, 3 Wallace Jr., 299.*

It is thus obvious that transfers of portions of the original Kansas Pacific road were contemplated that would result in its passing into the hands of four distinct ownerships, and such transfers would necessarily involve some adjustment or distribution of its obligations to the government.

These obligations are of two entirely distinct kinds.

The first are the regulations of the user of the road, requiring its operation without discrimination, giving preference for government transportation, fixing the charges for such transportation, &c., which equally affect all parts of the Pacific system and which may be considered, partly as regulations of public commerce, partly as servitudes imposed on the property in favor of the United States. These obligations are in their nature applicable to any part of the road and no difficulty would arise so far as they are in question by a division of the road. But the obligations of the second kind are entirely different, and consist of the pecuniary

obligation to repay the money lent, with the various subsidiary stipulations as to the application of part of the charges for transportation and net earnings to such purposes. They are secured by a lien, and any transfer of the road in sections necessarily contemplates some localization or distribution or apportionment of this lien.

Mr. Akerman held that these obligations applied to the whole of the road, and Mr. Pierrepoint goes further, and holds they so apply, although a part of the road has been transferred with the direct sanction of the government, the lienholder.

The right to build the portion of the original Central Pacific road between Sacramento and San Jose was assigned to the Western Pacific Railroad, and it is noticeable that the act ratifying that transfer uses broader language as to the obligations imposed on the transferee. The assignment is confirmed "with all the privileges and benefits of the several acts of Congress relating thereto, *and subject to all the conditions thereof*" (*Act of March 3, 1865, 13 U. S. Stat., p. 504*). Will it be contended that these words made the two companies joint debtors or sureties for each other for the repayment of the government advances?

We do not pretend that these Pacific acts are capable of any interpretation on these questions beyond discussion, or which will conciliate all possible objections. They are drawn with a looseness and inconsistency of language that offer ample scope for a kaleidoscopic variety of plausible interpretations. Lord Chancellor Nottingham used to say of the Statute of Frauds, that every line of it was worth a subsidy, a saying that a well known commentator burlesqued in adding that every line cost a subsidy. And before the mass of

litigation now pending as to the construction of the Pacific railroad acts has ended, either version of the saying will be as applicable to them as the famous act of *29 Car. II.*

But we think it can be shown beyond cavil that the interpretation we place on the clauses in question is not only more in accordance with the common sense aspect of transactions of this character, but is consistent with the most searching criticism of the text of the laws, while the construction put forward by Mr. Akerman, and adopted by Mr. Pierrepont requires important parts of the language used to be treated as meaningless or entirely disregarded.

For instance, the phrase "the obligations pertaining to said part of its line," is consistent with the idea that different obligations affect different parts of the road, but if all obligations equally affect all parts of the road, is absolutely meaningless.

Again, the enactment in the second section of the act of 1869, that "all the provisions of law for the operation of the Union Pacific Railroad, its branches and connections as a continuous line, without discrimination," shall apply to the Denver Pacific, is harmonious in our view of the matter, but is mere idle repetition if the previous section had, as contended by the government, already provided that all obligations of every description should apply as if the Denver Pacific had been constructed by the Kansas Pacific.

If the government can retain part of the money due the Denver Pacific to pay the debts of the Kansas Pacific, it can continue to do so till all that debt is paid. It is quite within the bounds of possibility that the bondholders of the three other fractions of the original Kansas Pacific may foreclose. After any such foreclosure,

all that the government would receive from the new ownership would be one-half of the transportation over their respective parts of the road. These sums would not probably be sufficient to keep down the interest, much more to liquidate the principal. What remedy would the Denver Pacific have against these purchasers under the foreclosure, so as to get back what the Denver Pacific had paid in this way on account of the Kansas Pacific debt? Against the Kansas Pacific corporation it is possible such a right to reimbursement might exist, but the purchasers would be under no such obligation, and the Denver Pacific would simply go on paying $10,000 or $20,000 per annum ad infinitum and would lose the money.

Now it is not, perhaps, beyond argument that the intention of the various acts was to make the diverse interests created in distinct portions of the road liable *in solido* for the government loan to the corporation, but it would certainly be a most extraordinary and cumbersome provision and one so embarrassing and burthensome to the capitalists invited to invest in these enterprises, that it would have hindered, if not prevented their co-operation. It cannot be alleged that when the money was provided, and the whole road built, any such sweeping liability was in any way apprehended.

With regard to the construction to be put on the word "assigns" in the act of 1873, we contend that that expression refers to assigns of the executory contract between the government and the respective Pacific companies, and not to assigns merely of parts of the property or rights of the subsidized companies. Thus, for instance, the Western Pacific Company ~~and the Union Pacific, Central Branch, are~~ such assigns: with the consent of the government, ~~each of them~~ was substi-

tuted for the original contracting company, received the benefits to which it was entitled and assumed its obligations. But the Denver Pacific was in no sense such an assign. The position assumed by it under the act of 1869 was not an assumption of the contract of the Kansas Pacific. The pecuniary obligations of that company to the government remained unaltered, the amount continued the same, and that company remained certainly the principal, and according to any fair construction of the act, the only debtor. The transaction between the government and the two companies was not a transfer *in globo* of the Kansas Pacific contract to the Denver Pacific, but a novation by delegation of the original contract, between the Kansas Pacific and the government, by which it was extinguished and new contracts with the two companies severally substituted in its place. The new contract with the Kansas Pacific was a modification of the original one, to the extent of relieving that company from the construction of the road from Denver to Cheyenne, in consideration of its relinquishing its right to the land grant appertaining to that part of the road. The contract created between the government and the Denver Pacific was altogether a new contract and in no way a mere assignment of that with the Kansas Pacific. And its obligations must be found in the act of 1869, which authorized and prescribed the terms of the novation. It is a familiar principle that such a novation puts an end to the original contract, with all its liens, pledges and collateral obligations. "Novatione legitime facta liberantur hypothecæ." *L. 18. ff. De Novat; Domat. Civil Law, Vol. 1, p. 515; Pothier, Des Obligations, Tom. 2, p. 7-13; Civil Code of California, sec. 1430; Addison (Ed. Morgan), sec. 372; Parsons I, 217.*

Thus the original obligation to apply half charges for transportation over the road between Denver and Cheyenne to reduction of the loan to the Kansas Pacific was at an end by the novation of the contract, and the existence of such a stipulation must in the innovated contract arise from a "fair interpretation" of the act of 1869, and as that act was in the nature of an offer to the undertakers of the Denver Pacific enterprise, to invest a large sum of money in the construction of the road between Denver and Cheyenne, the act ought not to be interpreted so as to spring upon them enormous and unlimited obligations, of which the act itself gave them no clear warning.

No extended discussion of the principles of construction that should be applied to the act of 1869, seems necessary. The ground is fully covered by the opinion of Judge DAVIS in the *United States* v. *Union Pacific R. R. Co.*, *1 Otto.*, *72*. His expressions that "The act . . . must be considered in the nature of a proposal to enterprising men to engage in the work. . . . It" [the government] "proffered the terms on which it would lend its aid. . . . It would have declared its purpose in unequivocal language." [The words used] "do not give notice that this exaction was intended," are relevant to the present case.

1. The 3d section of the act of Congress, March 3, 1869, authorized the Denver Pacific Company to make a first mortgage of the road to secure a loan of $32,000 per mile.

2. The act contemplated such mortgage, with warranty of title, as is usual for railroad companies to make, viz: of its railroad and appurtenances, rolling

stock and incomes, with power of sale free of all claim of the United States.

3. By the first section of the act of 1869, the U. P. Ry. Co. E. D., now the Kansas Pacific Railway Company, was authorized to adopt the line of road of the Denver Pacific Company, and to contract with it for its construction and operation; "to transfer to it all the rights and privileges, subject to all the obligations pertaining to said part of its line."

4. Among the "*rights and privileges*" to be transferred was the right to be a member of the Union Pacific Railway system, and the right and privilege of enjoying the special advantages conferred by Congress upon such members.

5. The more notable of such advantages are set forth in section 15 of the act of July 2d, 1864. *13 U. S. Stat., p. 162.*

6. Such rights and privileges were subject to the duty in the operation of the road, to afford to all the several companies, members of the Union Pacific Railroad system, the same rights and privileges without discrimination; and those were the "obligations pertaining to said part of its line," and none other.

7. The object of Congress was to expedite and secure the completion of the road, and when completed that the same should be a part of the system of railroads provided for in the Union Pacific Railroad acts, and be operated in harmony with such roads, the same as if operated by the Kansas Pacific Company.

8. This is made more clearly to appear by the provisions of sec. 2 of the act of 1869. By that the union of the three roads is required, and the declaration is made that the roads shall be operated "as a continuous line," the same as if the road had been constructed and operated by the Kansas Railroad Company.

9. Congress having authorized the mortgage of the roads at the rate of $32,000 per mile, the Government is estopped to say that it has an underlying statute mortgage and lien upon the road, growing out of an advance to the Kansas Pacific Company to aid in the construction of about 400 miles of its railroad.

10. Contracts are to be construed as the mass of mankind would generally understand them, and surely, in this case, no one would understand that the appellee in taking the assignment from the Kansas Company could by any possibility suppose that its road was to be charged with the payment of its assignor's debt to the United States. If any such thing had been intended, undoubtedly it would have been expressed. The liability is sought to be established by inferences and implications only, which is a method of interpretation never allowed in order to make one liable for the debt of another.

11. The United States did not, March 3, 1869, have a lien upon the roadbed already graded between Denver and Cheyenne, for the payment of its advances to the Union Pacific Railroad Company, Eastern Division, nor was it intended by the act to create such a lien, and Congress by authorizing the mortgage waived all right to assert such lien in the future. If the views of the law officers of the Government are sustained, the act of Congress in question will have operated as a trap to the unwary company and its bondholders.

12. The lien of the United States is limited to that portion of the road of the Kansas Pacific Company to aid in the construction of which it issued its bonds at the rate of $16,000 per mile.

13. Such lien is subordinate to a prior mortgage (if executed by the company), to secure bonds issued at

the rate of $16,000 per mile, except that the United States have the right to retain and apply to the payment of its advance, the half of the compensation earned by the company on that part of its road, for transportation of mails, &c.

14. By section 11, act of 1864, it appears that it was contemplated that some of the companies might have executed mortgages and bonds in excess of $16,000 per mile, and provision was made for such case, namely: that only so many government bonds should be issued as would aggregate with those issued by the company, $32,000 per mile. Bonds of the company, or of the company and the Government combined, could be issued as each section of 20 miles of the road was completed, at the rate of $32,000 per mile. The bonds of the United States might be half or less, but never more than half. The mortgage which the company should execute, was not limited to $16,000 per mile, but that the company might not receive from the United States more bonds than it was entitled to, the President of the company and its Secretary had to make affidavit whether any of their bonds had been issued by the company, and if so, *describing them*, so that the Secretary of the Treasury might determine the amount of bonds of the United States to be issued to the company, in all not to exceed $32,000 per mile. If the roads had been constructed as in the act of July 1, 1862, was provided, viz: to the 100th meridian, no such complication as this could have arisen, because the bond subsidy was to such meridian. The lien of the United States was to be the half or less of $32,000 per mile of a road to that point. With this primitive fact in mind, and that in all the changes of location of the road, Congress, in authorizing such changes, invariably provided that

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the bond subsidy should be limited to the amount granted, to the 100th meridian, the conclusion must be that the statute mortgage is limited to that portion of the railroad, viz: to the 100th meridian, or to its equivalent in distance, "*in consideration of which said bonds may be issued*," as provided in sec. 5, act July 1st, 1862. It may be here stated that the distance from the state line of Missouri to the 100th meridian at the supposed initial point was measured under the direction of the President (Johnson), and declared to be $393\frac{5}{16}$ miles, and for that distance government bonds at the rate of $16,000 per mile, were issued to the Union Pacific, Eastern Division Company, in all, $6,303,000, as alleged in the petition.

15. The appellee is not one of the companies embraced in sec. 5, act of 1862. It has not received any bonds from the United States, nor has the United States issued any bonds in aid of the construction of its road within the intent and meaning of said section 5.

16. The construction placed upon the statutes by the government officials makes the railroad of the Denver Pacific Company subservient to the United States for the payment of the debt of the K. P. R. R. Co., and for the reasonable compensation to be paid for government transportation, the mortgage bonds of $32,000 per mile are made subordinate to the claim of the United States against the K. P. R. R. Co. The proposition is monstrous, no one can hear it without exclaiming against its injustice.

17. The construction placed upon the statute by the government is in violation of the rule of law for the construction of statutes. The rule is, that where a law purports to interfere with private rights of property, on the basis of any assumed public need, or public

govermental function, all such statutes must be strictly construed and the benefit of all reasonable doubts and ambiguities must be given to the individual property or possessor of the rights.

18. In this case, the language of sec. 1, act of 1869, precludes all claim on the part of the government to the roadbed or right of way of the appellee. The government conceded nothing in that respect. It was ~~its~~ the corporate property, of the appellee admitted to be so by the very words of the act.

19. The title and text of the act of 1869, clearly show the object and purpose of Congress to be,

1. To expedite the completion of the two *railroads* to Denver, that is to say the Denver Pacific from Cheyenne, and the Kansas Pacific from near Sheridan in Kansas, in all nearly 400 miles of railroad.

2. That said road, when completed, should be links in, and be a part of the Union Pacific railroad system.

To accomplish the so much desired objects the act authorized the transfer of the land grant to the Denver Pacific Company, with the view of giving that company such aid and credit as the lands would afford, to enable it to command means to construct the road.

Authority to mortgage the roads was given, it being supposed that the securities under such mortgage would be more valuable if the same was authorized by Congress. Every provision of the act from first to last was inserted for the sole purpose of securing the rapid construction of the two roads to Denver, and when constructed that they should be component parts of the Union Pacific railroad system. It was not in the mind of any one at that day that the Denver Pacific Company by accepting the act would thereby assume the payment of the debts of the Kansas Company, and it

was not until 1873 that the measure of injustice of which we complain was consummated.

20. It was done under the pretext that the appellee was an assignee of the Kansas Company, within the intent and meaning of the act of March 3, 1873, while the fact is that it is not an assignee within the meaning of that act, and it was only by the exercise of strained construction of statutes and contracts (of late years too freely indulged in against corporations), that the conclusion was reached that the appellee had undertaken to pay the debts of the Kansas Company.

J. P. USHER,
Attorney for Appellee.

July 6. 74 Sub nom Stevens

9 Otto 463

Oct 2. 1878

In the Supreme Court
Of October Term, A. D. 1878.

No. 811

THE DENVER & RIO GRANDE RAILWAY CO.,
Appellant.

vs.

EBENEZER T. ALLING,
Appellee.

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF COLORADO.

In the Supreme Court
Of October Term, A. D. 1878.

THE DENVER & RIO GRANDE RAILWAY CO.,
Appellant.
vs.
EBENEZER T. ALLING,
Appellees.

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF COLORADO.

INDEX.

NOTE:—In this record the folios are numbered in two series. The first, from Fol. 1 to Fol. 324 includes all the proceedings down to the filing of the report of the oral testimony heard in open court; the second from Fol. 1 to Fol. 663 includes the report of testimony and all subsequent proceedings

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51	First amendments, (Nos. 1, 2, 3, 4).
60	Stipulation that the annexed copy of articles of association of the Cañon City and San Juan Railway Company may be treated as part of the bill.
72	Stipulation that the annexed copy of articles of association of plaintiff shall be considered part of the bill.
100	Order, leave to amend bill and for injunction.
110	Second amendment to bill.
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317	Stipulation that certain letters and map are correct and that the right of way of the Cañon City & San Juan Railway Co., as entered on said map was entered upon township plat of local land office.
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CIRCUIT COURT of COLORADO.

PLEAS

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF COLORADO.

Be it remembered, That heretofore and on to-wit the 27th. day of April, A. D. 1878, came H. A. Risley, Esq., a solicitor of this court, and filed in said court a certain bill of complaint, wherein The Denver and Rio Grande Railway Company is complainant and Ebenezer T. Alling et al. are defendants; and the said bill of complaint is in words and figures as follows, to-wit:

BILL.

UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO. }

Fol. 1 *To the Judges of the Circuit Court of the United States for the District of Colorado:*

The Denver and Rio Grande Railway Company, a corporation organized and existing under the laws of the State of Colorado, and a citizen of said State, brings this its bill of complaint against Ebenezer T. Alling, M. N. Megrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, who

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are citizens of said State, and against the Atchison, Topeka and Santa Fé Railway Company, a
2 corporation organized and existing under the laws of the State of Kansas, and William B. Strong, who is a citizen of the same State of Kansas.

And thereupon the plaintiff complains and says, that on or about the 27th day of October, 1870, William J. Palmer, Alexander C. Hunt and William H. Greenwood, made their certain certificate in writing, by them severally subscribed and sealed, setting forth among other things that it was their desire to form a company and become a body corporate under and by virtue of the provisions of Chapter 18 of the Revised Statutes of
3 the then Territory of Colorado, for the objects and purposes thereinafter set forth. That the corporate name of said company should be, The Denver and Rio Grande Railway Company; and that its object should be to locate, construct, operate and maintain, among other railways and telepraph lines therein mentioned, the Denver and Rio Grande Railway, commencing at Denver, Colorado, and running thence by a route, in said certificate designated, to a point on the Arkansas River at or above Pueblo, thence up the valley of the Arkansas River to a point at or near Cañon City, thence continuing up the valley
4 of the Arkansas through the big cañon of the same to a point at or near the mouth of the South Arkansas River; and thence, by a route in said certificate designated, to the valley of the Rio Grande, and thence down the valley of the Rio Grande to El Paso, in the State of Chihuahua. That the term of existence of said compa-

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ny should be fifty years from the filing of their said certificate, and that the operations of said company should be carried on in the several counties upon the route above mentioned. And
5 on or about the day of the date thereof, the said Palmer, Hunt and Greenwood did subscribe and acknowledge before William H. Townsend, a notary public of the County of Arapahoe in said Territory, several originals of said certificate, and did cause the same, with the certificate of the acknowledgment thereof thereunto appended or thereon written, to be filed—one in the office of the Secretary of said Territory of Colorado, and one in the office of the County Clerk of each County upon the route of said railway, and wherein the business of said corporation was by the terms of said certificate to be carried on.
6 And by virtue of these said certificates, the plaintiff became and still is a corporation for the purposes therein mentioned. That afterwards, and on or about the eighth day of June, A. D. 1872, the Congress of the United States by a certain act entitled "An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," did provide among other things that the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as might be needed for depots,
7 shops and other buildings for railroad purposes and for yard room and side tracks not exceeding twenty acres at any one station, and not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water and other material for

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the construction and repair of its railway and telegraph line, be and the same were thereby granted and confirmed unto said plaintiff by its corporate name aforesaid; and that all the rights, powers and franchises conferred by the laws of said Territory of Colorado or corporations created under them, for constructing and operating rail-
8 road and telegraph lines, were thereby ratified and confirmed to the plaintiff; and that the same rights, powers and franchises conferred by the general incorporation laws of the Territory of Colorado, for the construction of railroads and telegraph lines, were thereby granted to the said plaintiff for the extension and operation of its railway and telegraph lines, in and through any contiguous territory of the United States to the northern boundary line of Mexico; provided that the plaintiff should complete its railway to a point on the Rio Grande as far south as Santa Fé within five years of the passing of said act; and
9 should complete fifty miles additional south of said point in each year thereafter.

That afterwards, by the act of Congress approved on the third day of March, A. D. 1877, entitled "An Act to amend an Act entitled 'An Act granting the right of way through the public lands to the Denver and Rio Grande Railway Company, approved June eighth, eighteen hundred and seventy-two,'" it was enacted that the period of five years mentioned in the act of Congress before recited should be extended to ten
10 years from the passage of said first mentioned act.

That at the date of the passage of the said first mentioned act of Congress, the certificate of

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incorporation of plaintiff hereinbefore set forth was matter of record at the said Territory of Colorado, in the public offices before mentioned, and the provisions thereof and the purposes for which the plaintiff was incorporated and the route of the said Denver and Rio Grande Railway, as in the said certificate set forth, and all thereof were well known to the Congress and President of the United States.

That at the date of the first mentioned act of Congress, the big cañon of the Arkansas was and the same still is through the whole length thereof
11 situated on the public domain of the United States, and through the distance of one and one-quarter miles or thereabouts of the length of said cañon, the same was not nor is exceeding forty-five feet in width or thereabouts; and through the said distance the same then was and still is enclosed by precipitous mountains two thousand feet or thereabouts in height on each side of said cañon, so that not more than one railway with the right of way of the width in said act granted could or can be constructed through the said cañon; all which was at the date of the pas-
12 sage of said acts of Congress, and each thereof well known to the Congress of the United States.

That relying upon the rights, privileges and franchises by the acts of Congress before mentioned granted to the said plaintiff, and especially upon the grant of the way and right of way through the big cañon of the Arkansas, which by reason of the premises the plaintiff is advised by counsel was and was intended to be an exclusive right to occupy the said cañon for the purpose of its said railway, the plaintiff in the years A.D. 1871–2,

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having before that time located and completed its
13 railway from Denver aforesaid to Pueblo in the County of Pueblo in said State, began to and did survey and locate its railway from Pueblo by the route mentioned in the said certificate to Cañon City in the County of Fremont in said State, and thence by and through the big cañon of the Arkansas aforesaid to or in the vicinity of the mouth of the South Arkansas, in the said certificate of incorporation mentioned, and did throughout the whole length of said survey designate its said survey and the line of its said railway by sub-
14 stantial stakes such as are commonly used in like cases, and in sundry places in and near the said cañon did grade and excavate the bed and line of its said railway; and about the year A. D. 1875, the said plaintiff relying upon the rights, privileges and franchises granted as aforesaid, did construct and complete its said railway from Pueblo aforesaid by the valley of the Arkansas to Cañon City near the mouth of the said cañon.

That on or about the nineteenth day of April, A. D. 1878, said plaintiff had procured and obtained by subscription to its capital stock and otherwise moneys sufficient for and expressly for
15 the purposes of constructing its said line of railway from Cañon City aforesaid through the said big cañon of the Arkansas, and began to and did resume the work of constructing its said railway.

Plaintiff further shows that on or about the fifteenth day of February, A. D. 1877, Ebenezer T. Alling, John Locke and M. N. Megrue did make and cause to be filed in the office of the Secretary of said State of Colorado, their certain certificate setting forth among other things that

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they had associated themselves together for the purpose of forming a corporate body under the provisions of the general incorporation laws of
16 the State of Colorado, the same being contained in Chapter eighteen (18) of the Revised Statutes of the Territory now State of Colorado, approved January 10, A. D. 1868, and the acts amendatory thereto, to carry on the business of a railroad company; that the name of the company should be "The Cañon City and San Juan Railway Company;" that the objects and purposes of said company were to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in the County of Fremont, and the South Arkansas postoffice, in the County of Lake, in said State of Colorado, commencing
17 at the company's depot in Cañon City, to be thereafter selected, thence up the valley of the Arkansas River through the grand cañon thereof, thence to said South Arkansas postoffice; that the number of trustees of said company for the first year should be nine, and should consist of Ebenezer T. Alling, James Clelland, Henry R. Holbrook, Benjamin F. Rockafellow, John Locke, M. N. Megrue, William F. Bailey, Fred A. Raynolds and Samuel P. Dale, who plaintiff shows are the same persons who by the same names
18 aforesaid are made defendants hereto.

Plaintiff further shows that the said certificate did not in any manner show or set forth the name of the town or place or the County in which the principal office of the company should be kept, nor the number of the trustees who should manage the affairs of said company, save during the first year of its existence, and by reason of

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the omission of these matters the said certificate was and is, as plaintiff is advised by counsel, utterly void, and conferred no corporate rights, franchise or capacity on the persons named in said certificates or any of them, nor on the said so-called The Cañon City and San Juan Railway
19 Company.

But the plaintiff shows that on or about the nineteenth day of April, A. D. 1878, when the plaintiff had prepared and was about to resume the construction of its said railroad through the said big cañon of the Arkansas, the said the defendants before named falsely claiming and pretend- that they or some of them, with others, were a corporation organized and existing by virtue of the certificate last aforesaid, and to be entitled to locate and build a railroad from Cañon City aforesaid through the said cañon of the Arkansas,
20 combining and confederating with the said other defendants aforenamed and contriving to defraud and injure the plaintiff, and to anticipate and prevent the plaintiff from occupying said cañon or building its said railway through the same, did with a large force of servants and laborers begin to grade, excavate and construct a line of railroad from the mouth of the said cañon of the Arkansas towards the narrow part thereof before described, and did with their servants aforesaid occupy the mouth of said cañon, and did begin to locate and construct the grade of its said railroad upon and along the same line located, staked and designated by the plaintiff in the years A. D.
21 1871–2 as aforesaid; and they the said defendants are now still with a large force of servants and laborers engaged in constructing said rail-

road, occupying the surveyed line of plaintiff; and although the said plaintiff is now still occupying the said cañon in the narrow part thereof, the said defendant threatens to and unless restrained by the writ of injunction hereinafter prayed, will forcibly dispossess and drive away the engineers and servants of plaintiff now working thereat, and dispossess plaintiff of its located line and grade in the narrow part of said cañon,
22 and will with its railroad occupy the same.

That if plaintiff shall be dispossessed of its said line of railway in and through the narrow part of said cañon, plaintiff will be compelled to cease and abandon the further construction of its said line of railway, or to excavate a tunnel through the mountains enclosing said cañon; and plaintiff is advised by counsel and believes that by the act of Congress before recited, plaintiff is restricted in the construction of its said railway to the route designated in said Articles of Association, and hath no authority to enter the lands of the public
23 domain to the right or left of said cañon, and that in case it shall suffer itself to be excluded from said cañon and the line of its railway as heretofore located through the same, it will be compelled to abandon the further extension of said road.

That if plaintiff is permitted to build its said railway through the said cañon of the Arkansas upon the line by plaintiff heretofore located as hereinbefore set forth, the said railway will pass through the narrow part of said cañon in part, by an open cut excavated in the rocks enclosing said
24 cañon, and in part by a fill of the rock excavated in the walls of said cañon, and in part by bridge or trestle work of timbers let into and supported

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by the walls enclosing said cañon, and can be commenced at and carried on from several places in the narrow part of said cañon, and can as plaintiff believes, be speedily completed, so that during the present year, at the furthest, the road of plaintiff can and will be completed to the mouth of the South Arkansas river aforesaid, or thereabouts. That if plaintiff is dispossessed of its said line of railway and compelled to excavate and tunnel through the mountains enclosing said cañon, the work of excavating said tunnel can be carried on only at two points, and will, as plaintiff is informed and believes, require two
25 years for the completion of said tunnel; and the construction of plaintiff's road through the same, will as plaintiff is informed and believes, exceed the cost of the construction of said road by the plaintiff's line heretofore located as hereinbefore set forth, in the sum of five hundred thousand dollars or thereabouts. That by such tunnel the expense of the operation of plaintiff's road will be largely increased. That plaintiff's trains in passing through said tunnel, will always be under
26 necessity to reduce speed to one-half the rate, or thereabouts, at which the same might be run upon the road and line heretofore located as hereinbefore set forth; and plaintiff's trains in passing through said tunnel, will be continually liable to accidents against which it will be impossible for plaintiff to provide, and to which plaintiff's trains would not be liable in passing through said cañon by the line and road heretofore located; and by these means, the cost of operating plaintiff's road will be continually and always greatly increased, and the profits to plaintiff from the operation

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thereof, will be always greatly less than the same
27 otherwise would have been, and plaintiff will be forever deprived of great gains which it otherwise might and would have made.

That in the valley of the said Arkansas River, above the said cañon, is a fertile and well settled country, abounding in mines of gold and silver which are now and for a considerable time have been extensively and profitably worked, and which country is now without railway communication. That if plaintiff is prevented from occupying the line of its road as heretofore located and surveyed, as hereinbefore set forth, and constructing its railway thereon, and compelled to
28 excavate such tunnel through the mountains enclosing said cañon, plaintiff will be deprived during the period occupied in the excavation of such tunnel, of the traffic which it otherwise might and would have gained from the valley of the said Arkansas River above the said cañon, añd prevented from carrying upon the whole line of its said railroad from Denver to said Cañon City, and thence to the mouth of the said South Arkansas River, and back, great numbers of passengers and great quantities of freight, which it otherwise might and would have obtained for car-
29 riage, and of the profits which by the carriage thereof plaintiffs would have made; and thereby the gains, profits and value of the plaintiff's said railway throughout its whole length will be greatly diminished.

Plaintiff further shows that the said defendants are not, nor are any of them, nor do they or any of them claim to be entitled to construct a railway, or to occupy the plaintiff's located line of

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railway, through said cañon, by or under any license, grant or authority of plaintiff, but as plaintiff is informed and believes, solely by virtue of the pretended incorporation aforesaid of said Cañon City and San Juan Railway Company, under the laws of the State of Colorado, and the
30 certain act of Congress, entitled "An Act granting to Railroads the right of way through the public lands of the United States," approved March 3, A. D. 1875; and plaintiff is informed and believes that the said defendants have not, nor have any of them, nor hath the said pretended corporation, the Cañon City and San Juan Railway Company, ever caused the line of said railroad to be surveyed through the narrow part of said cañon of the Arkansas,—which plaintiff shows is commonly called the box cañon, or the box part of said cañon,—and that in other respects the said pretended incorporation of the Cañon City and San
31 Juan Railway Company hath not complied with the last entitled Act of Congress.

Plaintiff further shows, that by reason of the omisions, uncertainties and defects in and from the pretended certificate of incorporation of said pretented Cañon City and San Juan Railway Company, the said pretended incorporation is not, nor are the defendants or any of them entitled to the rights and privileges conferred by the said last entitled Act of Congress.

Plaintiff further shows that if it shall be prevented from constructing its railroad through the said cañon by its line heretofore located, as hereinbefore set forth, and compelled to abandon the
32 further extension of said road, or shall continue the same by excavating a tunnel through the

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mountains enclosing said cañon, it will be impracticable in any action at law which may be brought by plaintiff to redress its injuries in that behalf to show with reasonable certainty the measure of the damages by it sustained by the wrongful acts of the defendants.

And plaintiff avers that by reason of all these said premises the injury to plaintiff if it shall be prevented from constructing its railroad through the said cañon of the Arkansas by its line as heretofore located will be irreparable.

Plaintiff further shows that in all the wrongful and oppressive conduct before set forth the said
33 defendants, Ebenezer T. Alling, M. N. Megrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, instigated aided and abetted by the Atchison, Topeka and Santa Fé Railway Company, a corporation having its principal office and place of business at Pueblo, in the County of Pueblo, and by William B. Strong, of the State of Kansas, who plaintiff shows is the general manager of said Atchison, Topeka and Santa Fé Railway Company, and by one William R. Morley, and one A. A. Robinson, and are by them or some of them furnished with money for
34 the prosecution of work on its said railway, and with laborers and servants to work upon said railway, and to occupy the line of plaintiff's railway, and exclude the engineers, laborers and servants of plaintiff therefrom.

That in all the wrongful acts and doings before set forth, the defendants are animated solely by the desire to compel plaintiff to abandon the extension of its said railway, and in order that the said Atchison, Topeka and Santa Fé Railway

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Company may construct a line of railway from Pueblo, in the County of Pueblo, by the valley of the Arkansas, to and through the said cañon,
35 and by this means engross the traffic of the valley of the Arkansas above the said cañon and exclude plaintiff therefrom.

Plaintiff further shows that the said Atchison, Topeka and Santa Fé Railway is a corporation of large means, and by holding out to the inhabitants of said Cañon City the promise of great benefit to accrue to them from the construction of said Cañon City and San Juan Railway, hath induced the greater part of the said inhabitants to give it their aid and countenance in its wrongful and oppressive conduct aforesaid, and hath now at and in the vicinity of said big cañon of the
36 Arkansas, in its employ, a great number of laborers and servants, and the defendants threaten to dispossess and drive out the employés of the plaintiff, who are few in number, from the narrow parts of said cañon, and plaintiff fears that they will by force drive out and dispossess the employés of plaintiff from the said cañon, and occupy the same in the narrow parts thereof, if notice shall be given to the said defendants of plaintiff's intention to apply for such injunction; that for the reasons aforesaid this case is too urgent to admit of the delay incident to giving notice.

37 To the end therefore, that the said defendants may, if they can, show why plaintiff should not have the relief hereby prayed, and may severally answer to this, the plaintiff's bill of complaint, but not on oath, their oaths to their respective answers being hereby expressly waived, and that the said defendants and each of them, their offi-

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cers, agents and servants, and the officers, agents and servants of each of them be enjoined from occupying or in any manner interfering with the line of plaintiff's said railway, as heretofore surveyed and located, from Cañon City, in the
38 County of Fremont, and State of Colorado, through the big cañon of the Arkansas to the mouth of the South Arkansas River aforesaid; and from in any way or manner occupying or interfering with the grounds and way of plaintiff, one hundred feet in width on each side of the line of plaintiff's railway heretofore located as aforesaid; and from in any way or manner interfering with, preventing or obstructing, the grading or construction of plaintiff's railway, on the line thereof heretofore located as aforesaid; and from in any way or manner occupying or attempting
39 to occupy the said big cañon of the Arkansas, in the narrow part, or box part thereof aforesaid, or interfering with the plaintiffs occupation thereof and from in any way or manner aiding, abetting or encouraging others so to do. That a preliminary injunction issue forthwith upon the filing of this complaint, to restrain the defendants, and each of them, their officers, agents and servants, and the officers, agents and servants of each of them, from committing the wrongs aforesaid in the meantime, before the final hearing; and that plaintiff may have such other and further relief as to equity and the nature of its case shall require,
40 and to your Honor shall seem meet; and may it please your Honor to grant to your orator, the plaintiff aforenamed, the most gracious writ of subpœna of the United States of America, to be directed to the said Ebenezer T. Alling, M. N.

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Magrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Frederick A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, The Atchison, Topeka and Santa Fé Railway Company, and William B. Strong, and the rest of their confederates when discovered, thereby commanding them, and each of them at a certain day and under a certain pain therein to
41 be inserted, personally to be and appear before your Honor, in this honorable Court, then and there to answer all and singular the premises, and to stand to, abide and perform such order and decree therein as to your Honor shall seem meet. And your orator will ever pray, &c.

(Signed,)

THE DENVER AND RIO GRANDE RAILWAY COMPANY,

By HANSON A. RISLEY,

42 *Solicitor, of Colorado Springs, Colorado.*

E. T. Wells, E. L. Smith, Thomas Macon, of Denver, Cororado, of counsel.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

On this twenty-seventh day of April, A. D. 1878, before me personally appeared Hanson A. Risley, and made oath that he is the general solicitor of the Denver and Rio Grande Railway Company, plaintiff in the foregoing Bill of Complaint, and hath been such solicitor for two years
43 last past; and during that time hath become and is well acquainted with all the matters of fact set forth in the foregoing bill, and the same are true

of his own knowledge except as to those matters which are therein set forth upon information and belief, and as to those matters he is informed and believes that the same are true.

(Signed) EDWARD F. BISHOP,
Clerk Circuit Court, U. S. Dist., of Colorado.
(Seal of Circuit Court, U. S., Colorado.)

44 (Endorsed:) No. 154. Circuit Court U. S. District of Colorado. The Denver and Rio Grande Railway Company, *vs.* The Atchison, Topeka and Santa Fé Railway Co., *et al.* In chancery for injunction, &c Filed April 27, A. D. 1878. Signed Edward F. Bishop, clerk. Risley and Wells, Smith & Macon for complainants.

And thereupon and on to-wit: the 30th day of April, A. D. 1878, the following subpœna in chan-
45 was issued in said cause, to-wit:

[SUBPŒNA.]

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO. } ss.

The President of the United States of America: To the Atchison, Topeka and Santa Fé Railway, William B. Strong, Ebenezer T. Alling, M. N. Magrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred A. Raynolds, William R. Morley, Aaron A. Robinson, and James Clelland, Greeting: We command you and every of you, that you appear before our

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Judges of our Circuit Court of the United States of America, for the District of Colorado, at the City of Denver, in said District, on the first Monday in June next, (it being the 3d day of June, A. D. 1878,) to answer the bill of complaint of
46 the Denver and Rio Grande Railway Company this day filed in the office of the Clerk of said Court, in said City of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the marshal of the District of Colorado to execute, and make due return.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, and the seal of our Circuit Court of the United States, for the District of
47 Colorado, at the City of Denver aforesaid, this 30th day of April, in the year of our Lord, one thousand eight hundred and seventy-eight, and of the independence of the United States, the 102d year. (Signed)

[Seal of Circuit Court U. S., Colorado.] EDWARD F. BISHOP, *Clerk.*

(Memorandum:) The above named defendants are hereby notified that unless they and each of them shall enter their appearance in the office of the Clerk of said Court, at the City of Denver, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be
48 taken against them as confessed, and a decree entered accordingly. Signed Edward F. Bishop, clerk.

Which said subpœna was endorsed in words and figures as follows, to-wit:

Gen. No. 154. Circuit Court of the United States, for the District of Colorado. The Denver and Rio Grande Railway Co., *vs.* The Atchison, Topeka, and Santa Fé Railway Co. Chancery Subpœna. Returnable to rule day, first Monday in June, A. D. 1878. Signed Edward F. Bishop, clerk. Filed this 3d day of June, A. D. 1878. Signed Edward F. Bishop, clerk. Risley, Wells,
49 Smith & Macon, complainant's solicitors.

Afterwards and on the first day of June, A. D. 1878, the said subpœna was returned by the marshal with his endorsement in words and figures as follows thereon written, to-wit:

District of Colorado, ss. Denver, June 1st, A. D. 1878. I have duly executed the within writ, by delivering a true copy of the same to the within named Fred. A. Raynolds, Benj. F. Rockafellow, M. N. Megrue, Ebenezer T. Alling, Wm. F. Bailey, James Clelland, and W. B. Strong; as to said Raynolds at Denver, May 6th; as to Rockafellow at Denver, May 8th; as to Alling, Megrue, Bailey and Clelland at Cañon City, May
50 8th, and as to W. B. Strong at Pueblo, May 10th, 1878. All the other defendants herein named not found in my district. Signed P. P. Wilcox, Marshal. Marshal's fees, for service, $14.

And afterwards and on, to wit, the 4th day of May, A. D. 1878, came the said complainants by H. A. Risley, Esq., their solicitor, and filed in said court and in said cause a certain amendment to the said bill of complaint, in words and figures as follows, to wit:

AMENDMENTS TO BILL.

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UNITED STATES OF AMERICA, }

DISTRICT OF COLORADO. }

In the Circuit Court of the United States within and for the District of Colorado. Of July term, A. D. 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Plaintiff.

vs.

51 EBENEZER T. ALLING, M. N. MEGRUE, BENJAMIN F. ROCKAFELLOW, HENRY N. HOLBROOK, WILLIAM F. BAILEY, FRED. A. RAYNOLDS, WILLIAM R. MORLEY, AARON A. ROBINSON, JAMES CLELLAND, THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY, WILLIAM B. STRONG,
Defendants.

At this day comes the said plaintiff and amends its said bill of complaint heretofore filed herein, as follows:

FIRST AMENDMENT.

By inserting in the eleventh folio thereof, after the words "*two thousand feet or thereabouts in height on each side of said cañon*" the words "*and in the course of the said cañon, through the narrow*
52 *portion thereof of last mentioned, are many abrupt angles and curves.*"

SECOND AMENDMENT.

Also by inserting therein in the beginning of the twelfth folio of said bill, and next before the words "That relying upon the rights, privileges and

AMENDMENTS TO BILL.

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franchises by the acts of Congress before mentioned, granted to the said plaintiff, and especially upon the grant of the way and right of way through the big cañon of the Arkansas," the words following, to wit: "*Plaintiff further avers that by reason of the narrow and crooked*
53 *course of said cañon through the close or narrow part thereof, not more than one railway can be constructed through the said narrow part except by laying the track of one of said railways across the track of the other in many places, nor without great and constant hazard of collisions between the trains operated upon said two railways.*"

THIRD AMENDMENT.

Also by inserting in said bill, in the fourteenth folio thereof, next after the words "did grade and
54 excavate the bed and line of its said railway" the words "*of which said survey, location, designation, grading and excavation the defendants, before and at the time of their wrongful intrusion upon and occupation of plaintiff's said line, had notice.*"

FOURTH AMENDMENT.

Also by inserting in the thirteenth folio of said bill, after the words "box part of said cañon" the words "*or the Royal Gorge.*"

(Signed) ROBERT F. WEITBREC, *Treasurer.*

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY,
H. A. RISLEY, *Solicitor.*

55 Wells, Smith & Macon, of counsel.

AFFIDAVIT.

FOLIO

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

Robert F. Weitbrec, being duly sworn, says on oath that he is the treasurer of the Denver and Rio Grande Railway Company, plaintiff in the above entitled cause, and hath been such officer of said plaintiff company during eighteen months last past; and during that time hath had and now hath the general control and direction of the business of
56 the plaintiff and of the work of surveying and locating the line thereof and of the work of construction of said railway; and by reason of his said office and his connection aforesaid with the business and affairs of said plaintiff company he hath acquired and hath a full knowledge of the matters set forth in said bill and the above amendments thereto; and that all the matters of fact set forth in the above amendments are true, and that
57 the said bill with the said amendments is true to the knowledge of deponent except as to those matters which are therein stated upon the information and belief of the plaintiff, and as to those matters he has been so informed and believes it to be true.

(Signed) ROBERT F. WEITBREC.

Sworn to and subscribed before me this fourth
58 day of May, A. D. 1878, at Denver, in the district aforesaid.

(Signed) EDWARD F. BISHOP.
By HENRY SPARNICK,
Deputy.

(Endorsed:) No. 154. Circuit Court U. S. The Denver, Rio Grande R. R. Co. *vs.* The Atchison, Topeka and Santa Fé R. R. Co., et al.

STIPULATION.

FOLIO

Amendments to complaint. Filed May 4th, A. D. 1878. Signed Edward F. Bishop, clerk. By Henry Sparnick, deputy. Risley, Wells, Smith & Macon.

And afterwards and on, to wit, the 7th day of May, A. D. 1878, came the said defendants by C.
59 E. Gast, Esq., their solicitor, and filed in said court and in said cause a certain "stipulation and copy of articles of incorporation of the Cañon City and San Juan Railroad Co." in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

In the Circuit Court of the United States for the District of Colorado.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
EBENEZER T. ALLING ET AL.

60 It is hereby stipulated by and between the parties in the above entitled cause that the following is a true and correct copy of the articles of incorporation of the Cañon City and San Juan Railway Company filed in the office of the Secretary of State of the State of Colorado, on the 19th day of February, 1877; and that the same may be taken to be and considered a part of the plaintiff's bill of complaint filed in this cause for all intents
61 and purposes as though the same had been incorporated therein.

FOLIO

(Signed) WELLS, SMITH & MACON,
Complainant's Solicitors.

(Signed) CHAS. E. GAST,
Defendant's Solicitor.

ARTICLES OF ASSOCIATION OF THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY.

Know all men by these presents that the undersigned, Ebenezer T. Alling, John Locke and M. N. Megrue, of Cañon City, Fremont County, Colorado, have associated themselves together for the purpose of forming a corporate body under and
62 by virtue of the provisions of the general incorporation laws of the State of Colorado, the same being contained in Chapter Eighteen (18) of the Revised Statutes of the Territory (now State) of Colorado, approved January 10th, 1868, and the acts amendatory thereto, and to carry on the business of a railroad company under the provisions
63 granted by the laws aforesaid for the specific purpose hereinafter set forth.

I. The name of the company shall be the "Cañon City and San Juan Railway Company."

II. The objects and purposes of said company are to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in the County of Fremont, and the point known as the South Arkansas Post-Office, in the County of Lake, in the said State of Colorado, commencing at the company's depot-site in Cañon
64 City to be hereafter selected, thence up the valley of the Arkansas River through the Grand Cañon thereof; thence by the most practical route, fol-

lowing the Arkansas River to the point known as the South Arkansas Post-Office, in the County of Lake aforesaid. With full power and authority to buy lands and tenements, and to receive the same by gift or demise for the successful, convenient and profitable running of the said railroad, and
65 for depots, side tracks and work shops, and for any and all other purposes that may be desirable or profitable, with full power to convey alien and encumber the same in whole or in part and to sell the stock of the company.

III. The termini of said railroad shall be Cañon City in said County of Fremont, and the point known as the South Arkansas Post-Office, in the
66 said County of Lake, in the State of Colorado.

IV. The capital stock of said company shall be one hundred thousand dollars, to be divided into one thousand shares of one hundred dollars each.

V. The principal place of business of said company shall be Cañon City, in the said County of Fremont.

VI. The number of trustees of said company
67 who shall manage the business concerns of said company for the first year shall be nine (9), and shall consist of the following named persons, to-wit: Ebenezer T. Alling, James Clelland, Henry R. Holbrook, Benjamin F. Rockafellow, John Locke, M. N. Megrue, and William F. Bailey, Fred. A. Raynolds, Sam P. Dale.

VII. The officers of said company shall consist
68 of a president, secretary and treasurer, and until a regular election is held, as provided by law, Ebenezer T. Alling shall be president, Benjamin

F. Rockafellow shall be secretary and James Clelland shall be treasurer.

VIII. The term of existence of said company shall be twenty (20) years.

IX. The trustees shall have the power to make such by-laws and regulations from time to time as in their judgment shall be advisable for the successful management of the affairs of the said company.

69

X. An impression of the seal adopted by the said company as its corporate seal is hereto attached. [L. S.]

In witness whereof we, the undersigned, have hereunto set our hand and seals this 15th day of February, 1877.

EBENEZER T. ALLING. [SEAL.]
JOHN LOCKE. [SEAL.]
M. N. MEGRUE. [SEAL.]

STATE OF COLORADO,
County of Fremont, ss:

I, John Wilson, a County Clerk in and for said County and State, do hereby certify that Ebenezer T. Alling, John Locke and M. N. Megrue, who are known to me to be the persons whose names are subscribed to the foregoing certificate of incorporation, personally appeared before me and acknowledged that they signed and sealed the said instrument of writing as their free act and deed for the uses and purposes therein expressed.

70

Given under my hand and official seal this 15th day of February, 1877.

71 [L. S.] JOHN WILSON, *County Clerk.*

STIPULATION.

FOLIO

(Endorsed:) No. 154. Circuit Court U. S. The Denver and Rio Grande Railway Company *vs.* Ebenezer T. Alling et al. Stipulation and articles of incorporation of Cañon City and San Juan Railway. Filed May 7th, A. D. 1878. Signed, Edward F. Bishop, Clerk. C. E. Gast, G. B. Reed and Willard Teller, defendant's attorneys.

And afterwards and on, to-wit, the 8th day of May, A. D. 1878, came the said defendants by C. E. Gast, Esq., their solicitor, and filed in said court and in said cause a certain "stipulation and copy
72* of articles of incorporation of the Denver and Rio Grande Railway Company," in words and figures as follows, to wit:

STIPULATION AND ARTICLES OF INCORPORATION OF THE DENVER AND RIO GRANDE RAILWAY CO.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the Circuit Court of the United States for the District of Colorado.

DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
EBENEZER T. ALLING.

It is herein stipulated by and between the par-
73 ties to the above-entitled cause that the following is a true and correct copy of the articles of incorporation of the Denver and Rio Grande Railway Company, and that the same may be taken and considered as part of plaintiff's bill of complaint

ARTICLES OF INCORPORATION OF PLAINTIFF.

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filed in this cause, the same as though originally incorporated therein.

(Signed) WELLS, SMITH & MACON,
Solicitors for Complainant.

(Signed) CHAS. E. GAST,
Solicitor for Defendants.

CERTIFICATE OF THE DEVER AND RIO GRANDE RAILWAY COMPANY.

74 Whereas we, the undersigned, desire to form a company and to become a body corporate under and by virtue of the provisions of Chapter eighteen (18) of the Revised Statutes of the Territory of Colorado for the objects and purposes hereinafter set forth. Now, therefore, this is to certify as follows, viz:

First. That the corporate name of said company shall be the Denver and Rio Grande Railway Company.

Second. That the object of said company is to locate, construct, operate, and maintain certain
75 railway and telegraph lines hereinafter named and described, and to acquire, improve and dispose of lands or any interests therein, either absolutely or conditionally, for the purpose of aiding in the construction and business of said railway and telegraph lines, and in any manner promoting the interests of the same.

The said railway and telegraph lines are named,
76 described and by routes are designated as follows:

FIRST.—THE DENVER AND RIO GRANDE RAILWAY.

The route of this railway is described as follows: Commencing at Denver, Colorado Territory, thence

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running up the valley of the South Platte River, on the southeast side thereof, to a point at or near the mouth of Plum Creek; thence up the valley
77 of Plum Creek to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek Valley to the lake in Township eleven (11), Range sixty-seven (67) west, on the crest of the ridge dividing the waters of Plum Creek and Monument Creek, thence down the valley of the Monument Creek to a point at or near the junction of the
78 valleys of the Monument and Fountain qui bouille, or to a point in the Fountain Valley, below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible. Thence by the valley of the Fountain or across its west tributaries to such a point on the Arkansas River at or above Pueblo as may be found upon a detailed survey to be the most eli-
79 gible for intersecting the same; thence up the valley of the Arkansas River to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the Big Cañon of the same to a point at or near the mouth of the South Arkansas River; thence by the valleys or the adjoining slopes of the South Arkansas River and of
80 Poncho Creek to the summit of the divide between the waters of the Arkansas and the San Luis Park (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis Valley to the valley of the Rio Grande del Norte; thence in a general southerly direction, by the particular route which may be determined upon a detailed survey to be the
81 most eligible, down the valley of the Rio Grande

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to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande, on either side of the river, as may be found expedient, or crossing from one side to the other when desirable, to El Paso, in the State of Chihuahua, with the privilege of consolidating or uniting with and operating any connecting railway in the republic of Mexico.

SECOND.—THE DENVER AND SOUTHERN RAILWAY,

Commencing at the most eligible point on the said Denver and Rio Grande Railway in the valley of
82 the Arkansas or of the Fountain, and running in a general southerly direction to the base of the Spanish range of the Rocky Mountains; and thence crossing said range by the Sangre de Christo, Cucharos, Las Animas, or such other pass as detailed survey may determine to be the best, to the valley of the Rio Grande; thence down the valley of the Rio Grande to a connection with the Denver and Rio Grande Railway and to El Paso.

83 THIRD.—THE SOUTH PARK RAILWAY,

Commencing at a point on the said Denver and Rio Grande Railway, in the valley of the South Platte River, at or near the mouth of Plum Creek; thence up the valley of the South Platte River to the mouth of its Big Cañon; thence through said Big Cañon and up the valley of the South Platte to
84 the South Park, still following up the valley of the South Platte, to a point at or near the town of Fairplay; thence across the "Continental Divide" by the Hoosier, Hamilton or other pass to the valley of the Blue; thence by such route as may be

found most eligible with a view of developing the mineral and agricultural wealth of Western Colorado to the western border of Colorado; and thence by the most eligible route to Salt Lake City, with a branch from said railway at or near
85 the intersection of the Salt branch with the South Platte to the salt works.

FOURTH.—THE WESTERN COLORADO RAILWAY,

Commencing at a point on said Denver and Rio Grande Railway at or near the mouth of the South Arkansas River; thence up the valley of the main Arkansas to the summit of the range dividing the waters of the Arkansas and the Grand River of the West; thence by the valley of the Grand or
86 such other tributary of the Great Colorado River as may be found most practicable and eligible with a view of developing the mineral and agricultural wealth of Western Colorado, to a point on the western border of Colorado; and thence by the most eligible route to Salt Lake City.

FIFTH.—THE MORÉNO VALLEY RAILWAY,

Commencing at a point on said Denver and Rio Grande Railway at or near the mouth of the Cos-
87 tillo, or such other eastern tributary of the Rio Grande as may be found most eligible, and to extend up said Costillo, or most practicable valley, to the mines and pineries of the Maxwell estate.

SIXTH.—THE SAN JUAN RAILWAY,

Commencing at a point on the said Denver and Rio Grande Railway, near or accessible to the

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valley of the Charma, or such other western tributary of the Rio Grande as may be found most
88 eligible, and to extend thence by such most eligible valley to the divide separating the waters of the Great Colorado from the Rio Grande, and thence to such point in the San Juan valley as may be most expedient.

SEVENTH.—THE GALLESTO RAILWAY,

Commencing at a point on the said Denver and Rio Grande Railway in New Mexico, between Santo Domingo and San Felipe, and extending
89 thence by the most eligible route to the gold mines and anthracite coal fields of the "Placier Mountains."

EIGHTH.—THE SANTA RITA RAILWAY,

Commencing at the most eligible point on the said Denver and Rio Grande Railway in Southern New Mexico, between Fort Craig and El Paso, and extending thence in a general westerly direction to the mines of Pinos Altos and Santa Rita, and
96 to the Silver mines of the Burro Mountains.

It is intended that the telegraph lines mentioned in this certificate shall be appendant and appurtenant to the said Railway, and are to be constructed by the said Denver and Rio Grande Railway Company, at their option, on and along any or all of the railway routes above specified, or as near thereto
91 as may be expedient, and the termini of the said telegraph lines are to be the same as the termini of the several railways above mentioned, and along which the said telegraph lines, or any of them, may be built.

ARTICLES OF INCORPORATION OF PLAINTIFF.

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And the said railway and the said telegraph lines are to be built within, or through and across, and operated in the Counties of Arapahoe, Douglas, El Paso, Pueblo, Fremont, Lake, Saguache,
92 Summit, Park, Jefferson, Las Animas, Costillo, Conejos, and Huerfano, in Colorado, and in such Counties of New Mexico as the routes herein described may pass through.

Third. The capital stock of said company shall be two and one-half million dollars, to be divided into twenty-five thousand shares at one hundred dollars per share.

93 Fourth. The term of the corporate existence of said company shall be fifty years from the filing of this certificate.

Fifth. The number of the Trustees of said company shall be five, and Wm. P. Mellen, of New York, R. Henry Lamborn, of Philadelphia, Alexander C. Hunt, of Denver, Wm. J. Palmer, of Colorado, Howard Schuyler, of Colorado, are hereby designated as Trustees to manage the concerns of said company for the first year of its
94 existence.

Sixth. That the principal office of said company shall be in the city of Denver, unless legally changed to some other place, and the operations of said company shall be in the several Counties and upon the routes above mentioned.

Seventh. The Trustees shall have power to make such By-Laws as they may deem proper for the management and disposition of the stock
95 and affairs of the company.

FOLIO

In witness whereof we have hereunto set our hands and seals.

WM. J. PALMER. [SEAL.]
(Rev. Stamps, ALEX. C. HUNT. [SEAL.]
15c.) W. H. GREENWOOD. [SEAL.]

TERRITORY OF COLORADO, }
} ss.
COUNTY OF ARAPAHOE, }

I, William H. Townsend, a notary public in and for said County, in the Territory aforesaid, do hereby certify that William J. Palmer, Alex. C. Hunt, and William H. Greenwood, who are per-
96 sonally known to me as the parties whose names are subscribed to the foregoing or annexed Certificate of Incorporation, as parties thereto, and as having executed the same, appeared before me this day in person, and acknowledged that they signed the said instrument of writing for the uses and purposes therein set forth.

In testimony whereof, I have hereunto set my hand and affixed my Notarial Seal,
[L.S.] this 27th day of October, A. D. 1870.

WILLIAM H. TOWNSEND,
Notary Public.

97 STATE OF COLORADO, }
} ss.
SECRETARY'S OFFICE, }

I, William M. Clark, Secretary of the State of Colorado, do hereby certify that the foregoing is a correct transcript of the Certificate of Incorporation of the Denver and Rio Grande Railway Company which was filed in this office the twenty-seventh day of October, A. D. 1870, at 4 o'clock P. M., and admitted to record.

ARTICLES OF INCORPORATION OF PLAINTIFF.

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98 In testimony whereof I have hereunto set my hand and caused the great seal of the State of to be affiixed this seventh day of May, A.D. 1878.

[STATE SEAL COLORADO.]

(Signed) WM. M. CLARK,
Secretary of State.
By E. WALDEN BREWSTER,
Deputy.

(Endorsed:) No. 154. Circuit Court U. S. District of Colorado. D. & R. G. R'y, *vs.* Ebenezer T. Alling, A., T. & S. F. R'y, *et al.* Stipulation and Copy, Articles of Incorporation D. & R. G. R'y. Filed May 8th, A. D. 1878. Signed Edward F. Bishop, clerk. Chas. E. Gast, solicitor for defendant.

And afterwards and on, to-wit: the 9th day of May, A. D. 1878, at Chambers in vacation preceding the July term, A. D. 1878, of said court, the following order was had, signed by the Hon. Moses Hallett, District Judge, filed and entered

99 of record in said court and in said cause, to-wit:

ORDER, LEAVE TO AMEND BILL, AND FOR RESTRAINING ORDER.

THE DENVER AND RIO GRANDE RAILWAY COMPANY,
Plaintiff.
vs.
EBENEZER T. ALLING, M. N. MEGRUE, BENJAMIN F. ROCKAFELLOW, HENRY N. HOLBROOK, WILLIAM F. BAILEY, FRED. A. RAYNOLDS, WILLIAM R. MORLEY, AARON A. ROBINSON, JAMES CLELLAND, THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY, AND WILLIAM B. STRONG,
Defendants.

For an Injunction &c.

ORDER, LEAVE TO AMEND BILL, AND FOR INJUNCTION.

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At this eighth day of May, A. D. 1878, in vacation after December Term, A. D. 1877, of the
100 said court, before the Honorable Moses Hallett, one of the justices of said court, at Chambers in the City of Denver, came the said plaintiff, by Hanson A. Risley, Esq., its solicitor, and the defendants by Chas. E. Gast, Esq., their solicitor, also came; and on motion of the said plaintiff, by H. A. Risley, Esq., its solicitor, the defendants by their solicitor consenting.

It is ordered that plaintiff have leave to amend the prayer of its said bill of complaint herein, by inserting therein next before the words "and from in any way or manner aiding or abetting or en-
101 couraging others to do any of these things," in the 39th folio of said bill, the words "*and from in any way or manner constructing or attempting to survey, locate or construct their line of railroad in or through the said cañon or any part thereof;*" and the said amendment being now filed, it is ordered that the same stand as part of the record.

And this cause coming on now, to be heard upon the motion of the plaintiff for a preliminary injunction pursuant to the prayer of its bill lately filed herein, was argued by counsel, as well on
102 the part of the plaintiff as the said defendants; and it being alleged in plaintiff's bill that by a certain Act of the Congress of the United States, approved June 8th, A. D. 1872, there was granted to the said plaintiff, through and over the public domain, a right of way, one hundred feet in width on each side of the centre of its track, from a point at or above Pueblo, in the County of Pueblo, up the valley of the Arkansas River to a
103 point at or near Cañon City, thence continuing

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up the valley of the Arkansas River, through the big cañon thereof, to a point at or near the mouth of the South Arkansas River, with other ways, rights and privileges, in said act described; and it appearing that the defendants Alling, Megrue, Rockafellow, Bailey, Raynolds, Clelland, claiming to be members and officers of the Cañon City and San Juan Railway Company, and claiming that the same is a corporation, and hath authority

104 to construct a railway from Cañon City through the said cañon, are, with the aid and assistance of the said other defendants, and with a large force of laborers and servants, attempting to construct their said railway through the said cañon, and in whole or in part upon the same line and route surveyed and located by plaintiff in the years 1871–72, and are attempting to occupy the said cañon; and that there is danger of irreparable injury to the plaintiff from delay, it is therefore:

105 *Ordered*, that the said defendants, and each of them, their officers, agents and servants, be restrained and enjoined, until the further order of one or more of the Judges of this Court, from occupying or attempting to occupy the said big cañon of the Arkansas, and from in any way or manner constructing or attempting to survey, locate or construct, their line of railroad through the said cañon; and from in any way or manner aiding or abetting or encouraging others to do

106 any of these things. And upon inquiry touching the bounds of said cañon, it seemeth to the said Justice, and it is ordered that for the purpose of this suit, the said cañon be taken and deemed to begin at what is known as the "Point of Rocks," at the mouth of said Grand Cañon, and

INJUNCTION WRIT.

FOLIO

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLORADO. }

To Ebenezer T. Alling, M. N. Megrue, Benjamin
112 F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, The Atchison, Topeka and Santa Fé Railway Company, and William B. Strong, and to your attorneys, solicitors, agents and servants, and to each and every of them, greeting:

Whereas it has been represented to the honorable the judges of the Circuit Court of the United States for the district of Colorado, on the part of The Denver and Rio Grande Railway Company, complainant, in its certain bill of complaint exhibited before said judges, and filed in said court
113 against you, the said parties aforesaid, to be relieved, touching the matters and things therein complained of.

In which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant, touching the matters set forth in said bill, and that your actions and doings in the premises are contrary to equity and good conscience. And the Hon. Moses Hallett, district judge, having under his hand granted an order that a writ of injunction issue out of said court, according to the prayer of said bill.

114 In consideration thereof, and of the particular matters in said bill set forth, you are hereby strictly commanded that you, the said Ebenezer T. Alling,

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M. N. Megrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, The Atchison Topeka and Santa Fé Railway Company, and William B. Strong, and the persons before mentioned, and each and every of you, do absolutely desist and refrain from occupying, or attempting to occupy the Big Cañon of the Arkansas River, beginning at what is known as the "Point of Rocks" at the mouth of said
115 Grand Cañon, and about two miles above the village of Cañon City, and extending and continuing thence up the said Arkansas River, following the course of the river to a point one-half mile above the wagon bridge over said river, known as the "McCandless" or Twelve mile bridge, and from in any way or manner constructing, or attempting to survey, locate or construct a line of railroad through the said cañon, and from in any way or manner aiding or abetting or encouraging others to do any of these things until this honorable court, in chancery sitting, shall make other order
116 to the contrary. *Hereof fail not* under penalty of what the law directs.

To the marshall of the said district, to execute and return in due form of law.

Witness, the Hon. Morrison R. Waite, Chief [SEAL CIRCUIT COURT U. S., COLORADO.] Justice of the Supreme Court of the United States, and the seal of the Circuit Court, at Denver, in the district aforesaid, this 9th day of May, A. D. 1878.

(Signed) EDWARD F. BISHOP, *Clerk.*

ORDER, INJUNCTION MODIFIED.

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DISTRICT OF COLORADO, *ss:*

I have duly executed the within writ by deliv-
117 ering a true copy thereof to M. N. Megrue, Wm. F. Bailey, James Clelland, Ebenezer T. Alling on the 10th day of May, 1878, at Cañon City, in the County of Fremont, district of Colorado; the other defendants named in this writ not found in my district.

(Signed) P. P. WILCOX, *Marshal.*

Gen. No. 154. Circuit Court of the United States. The Denver and Rio Grande Railway Company *vs.* Ebenezer T. Alling et al. Restraining order. Filed in clerk's office, Circuit Court, this 3rd day of June, A. D. 1878. Signed, Edward F. Bishop, clerk, Risley, Wells, Smith & Macon, petitioner's attorneys.

And afterwards and on, to-wit, the 1st day of
118 June, A. D. 1878, at chambers in vacation preceding the July term, A. D. 1878, of said court, the following order was had signed by the Hon. Moses Hallet, district judge, filed and entered of record in said court, and in said cause to-wit:

ORDER, INJUNCTION MODIFIED.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
EBENEZER T. ALLING, M. N. MEGRUE, BENJAMIN F. ROCKAFELLOW, HENRY H. HOLBROOK, WILLIAM F. BAILEY, FRED. A. RAYNOLDS, WILLIAM R. MORLEY, AARON A. ROBINSON, JAMES CLELLAND, THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY.

OPINION OF HALLETT, J.

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119 Now, on this first day of June, 1878, this cause coming on to be further heard on the pleadings therein, and upon proofs taken before Hon. Moses Hallet, district judge, it is *ordered* that the injunction heretofore, and on the 8th day of May, A. D. 1878, allowed in this cause be limited in its operation to that part of the cañon of the Arkansas River known as the Royal Gorge, and more particularly described as commencing at or about the centre of the northwest quarter of section twenty-six (26) at a point seven or eight hundred
120 feet above a ravine coming in from the north on the said river, and extending up the said river to the centre of south half of the northwest quarter of section twenty-two (22), township eighteen south, range 71 west, in the county of Fremont and State of Colorado, supposed to be about sixty-six hundred feet in length, and that the said Cañon City and San Juan Railway Company be allowed to enter upon said last mentioned track and cañon, and grade the same for a railroad therein, but not
121 to lay ties or rails on any part thereof until the further order of this court.

And on the same day certain opinions of the district judge of said court and of the circuit judge of said circuit were filed in said court in words and figures as follows, to-wit:

OPINION.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.
} Bill for injunction.

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THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* EBENEZER T. ALLING ET AL. } Bill for injunction.

Hallett, J.

Two companies claim the same right of way for a railroad through the Grand Cañon of the Arkansas River where there is room for only one road. That remarkable defile is in the public domain,
122 and each company claims under an act of Congress. The interpretation and application of these acts presents a question under the laws of the United States which may properly be considered in this court pursuant to the provisions of the act of 1875, (18 Stat., 470). The jurisdiction in equity to determine the right and restrain any disturbance of it is not doubted since there is no adequate remedy at law. The first of these suits was brought in the district court of Fremont County, and an
123 injunction was there allowed restraining the defendant company from prosecutiug work in the cañon. After some days that suit was removed into this court on petition of the defendant therein under the authority of the act of 1875, and the defendant in that suit brought a new suit in this court against the corporators of the first named company and some others to enjoin them from disturbing its right to occupy the cañon. The reason for bringing this last suit against the cor-
124 porators of the San Juan Company and not against the company itself is an irregularity in the organization of the latter company on which the plaintiff relies to impeach its validity.

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Argument was heard in the last mentioned suit on a motion for injunction, and perceiving that the same matters were involved in both suits and that the right was somewhat doubtful, it was thought best to continue the injunction in the first suit and
125 allow a like writ in the second; in effect to place both parties under restraint until mature consideration of the questions presented could be had. The bill in the first suit was something lame and impotent, and the plaintiff therein was allowed to file an amended bill upon which a writ was issued of the same scope and effect as that allowed in the second suit. As the controversy stands both parties are enjoined from prosecuting the work of a great public improvement where one must be
126 entitled to go on, and therefore the court should not halt between opinions.

Both cases will be taken into view in this discussion and the allegations in each bill, so far as they are not in conflict, will be taken as true. It is believed that enough is admitted in the records of the two cases to determine the right to a preliminary injunction. The Denver and Rio Grande Railway Company, defendant in the first suit and
127 plaintiff in the second, has the senior claim, and in ascertaining its right we shall reach the principal question in the case. That corporation was organized in the year 1870, under Chap. XVIII of the Revised Statutes of the Territory (R. S., 47). The object of the corporation, as expressed in the certificate, was to construct a number of railway and telegraph lines, or perhaps it would be more correct to say a trunk line with numerous branches.
128 The principal line was to be extended from Denver through Colorado and New Mexico to El Paso in

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the State of Chihuahua, and there were to be seven branches, one of them extending to Salt Lake City in Utah, and the others to various points in Colorado and New Mexico. These lines were defined generally in the certificate as extending from place to place, or lying in the valley of some stream or through some cañon or pass in the mountains, but no attempt was made to give
129 courses and distances, or to specify in any other way the exact location of the routes selected. Indeed it seems that the various lines had not been fixed except as to the general direction, and no survey had been made by which they could be definitely located. Referring to the principal line, which was more particularly defined than any of the branches, the part which includes the disputed territory is as follows: "Commencing at Denver, Colorado Territory, thence running up
130 the valley of the South Platte River, on the south-east side thereof to a point at or near the mouth of Plum Creek; thence up the valley of Plum Creek to a point at or near the forks of East Plum Creek and West Plum Creek; thence up the main east branch of Plum Creek valley to the lake in Township eleven (11), Range sixty-seven (67), west, on the crest of the ridge dividing the waters of Plum Creek and Monument Creek, thence down the valley of the Monument Creek to a point at or near the junction of the valleys
131 of the Monument and Fountain qui bouille, or to a point in the Fountain valley below the mouth of the Monument, if the detailed survey shall determine the latter to be the most eligible. Thence by the valley of the Fountain or across its west tributaries to such a point on the Arkan-

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sas River, at or above Pueblo, as may be found upon a detailed survey to be the most eligible for intersecting the same; thence up the valley of the
132 Arkansas River to a point at or near Cañon City; thence continuing up the valley of the Arkansas through the big cañon of the same to a point at or near the mouth of the South Arkansas River; thence by the valleys or the adjoining slopes of the South Arkansas River and of the Poncho Creek, to the summit of the divide between the waters of the Arkansas and the San Luis Park, (known as Poncho Pass); thence by the most eligible route in a general southerly direction down the San Luis valley to the valley
133 of the Rio Grande del Norte."

Every one who is at all acquainted with the geography of the country, will know that the line between the mouth of Monument Creek and Cañon City, as thus described, embraces a strip of country more than forty miles wide, in which the road might have been located. If it was more restricted in the mountain region beyond Cañon City, it was because the valley of the Arkansas was narrower there, and not from any effort of the corporation
134 to describe the line with accuracy. Further on in the San Luis Valley, which is many miles wide, it takes the whole valley for its location, and so also down the Rio Grande River through New Mexico.

It is to be observed, however, that the act under which the corporation was organized did not require any description of the lines of road to be constructed, or even that the termini of the roads should be stated. But it did require a state-
135 ment of the objects of the company, and in the

case of a railroad, perhaps that would be most conveniently done by giving some general description of the road. That was a general act providing for many different corporations, which was probably intended to comply with the direction of Congress in 1867, that Territorial Assemblies should not grant private charters, but could, by general acts, permit the incorporation of persons for mining, manufacturing and other industrial pursuits. (14 Stat. 426.) It contained general
136 provisions applicable to all corporations which should be organized under it, and special provisions which were applicable to some; only railroad companies were not of this latter class, but were left to the general provisions of the act, which required no designation of the route or termini of the road further than would be necessary in stating the objects of the company.

Without other authority than was given by this
137 general act of the Territory, the company built its road to Pueblo. On the 8th day of June, 1872, Congress passed an act granting to the company right of way over the public lands, and confirming the powers given to the company by the Territorial law. The act required the company to build its main line as far south as Santa Fé, within five years, which period is by a later act extended to ten years. (19 Stat. 405.)

The material part of the act for present consideration is as follows:

"That the right of way over the public domain,
138 one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for

yard room and side tracks, not exceeding twenty acres at any one station, and not more than one station in every ten miles; and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and
139 telegraph line be, and the same are hereby granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns." (17 Stat. 339.)

On behalf of the Rio Grande Company it is contended that this act conferred an exclusive right to occupy the grand cañon of the Arkansas River for railroad purposes; that the certificate of organization is a public record of which Congress had notice at the time of passing
140 the act, and as the cañon is mentioned in the certificate as a point on the line of the road, the company was authorized and required to build in that place. And certainly it will be conceded that Congress was advised of everything that the law required to be stated, and that was in fact stated in the certificate of incorporation. That certificate was evidence of the corporate existence under the Territorial law, and Congress in recognizing the company and confirming to it the
141 powers given by the law of the Territory, must have acted with reference to it. And so if the act had required the corporators to describe the various lines of road which the company proposed to build, and they had so described them with particularity in the certificate, the effect of the act of Congress would not be donbtful. In that

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case the act of Congress would operate as a present grant of the particular way or ways described in the certificate.

But the certificate does not in fact locate the
142 different lines of road with such particularity as is required in granting a right of way. Said the Supreme Court of Massachusetts: "A way *Extra termini* imparts a right of passing in a particular line."—(Jones *v.* Percival, 5 Pick., 485.) And if the line is not described with reasonable certainty it cannot be said that the grant is of a particular way by description No one will contend that a grant of right of way to a railroad company, either by the government or an individual, must
143 specify the exact line of the road but at least the tract to be traversed by the road must be designated. The description must come within something less than forty miles of the line of location. In this certificate there is nothing like a description of any particular line. The mention of points and places on the various lines was but an indication of the general course and direction of those lines and the statement that the line should be in a certain valley was not more definite. Like the mouth of Monument Creek, the Arkansas River,
144 Cañon City, and other points on the line, the object of naming the big cañon of the Arkansas River was apparently to give the general course of the road. Certainly it cannot be said that naming these points and places is a sufficient description to charge the public lands along the line with an easement of which purchasers would have notice. If it is claimed that we should separate the big cañon from the remainder of the line and accept that portion as sufficiently described

because its mighty walls enclose a narrow space,
145 the proposition cannot be entertained. The grant is an entirety as to all public lands lying in the course of the several lines of road and it would be absurd to say that it was intended to pass this cañon by description and nothing more. Congress had already learned the stragetical value of passes and defiles in the mountains, and when it was intended to grant such places by description the right of other companies to occupy the same ground was reserved. (17 Stat., 202.)

146 We may say, then, that this was no grant of a particular way over the public domain, and we have yet to consider its effect as a general authority to appropriate the public lands to the uses of the company. That it is in terms such a grant no one can deny and we should hesitate to say that it may be void for uncertainty. We may concede the power of Congress to charge all the government lands in perpetuity with a floating easement which may be asserted at any time against innocent
147 purchasers who have bought of the public lands in good faith, but we should be slow to believe that such was the intention unless it is plainly declared. If by the act of 1872 the company acquired a present right to appropriate for right of way and stations any lands that were then public lying in the general course of any of its lines farms, villages and towns that have been taken up since that time must yield to such
148 right. It is not to be presumed, however, in the absence of express declaration that such a result was intended by Congress. "If A seized of a great waste, grants the moity of a yard land lying in the waste without ascertaining what part,

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or the special name of the land, or how bounded, this may be reduced to a certainty by the election of the grantee. But it is otherwise in the case of the King's grant for there can be no election in that case and therefore the grant is void for uncer-
149 tainty."—(Bacon's Ab. title Grant, H., 3.)

And so we may say in accordance with the principle that a grant to a corporation shall be strictly construed in favor of the public and against the corporation, that the act of 1872 gave nothing except upon the location and construction of the road. In the general act of 1875 (18 Stat., 482) and in most special acts granting right of way over public lands (16 Stat., 395; 17 Stat., 202, 212, 224, 340, 343, 393, 612; 18 Stat., 130, 274, 306,
150 309,) provision is made for filing a plat of the route selected with the Secretary of the Interior and the line of the road is then minuted on the plats of the public surveys in the local office. In this way full notice is given to purchasers and all who may be interested in the subject of the right claimed by the company. Any sale of the lands must be made subject to the easement and hence the necessity for specifying the lands so to be affected. Under these acts its seems very clear that no right
151 is secured by the company until the plat is filed with the Secretary. In the act of 1872, and in some other acts, (14 Stat., 211, 237, 240, 290, 294; 16 Stat., 192; 17 Stat., 280) no such provision is found and the omission suggests that some other method of designating the lands appropriated by the company was intended. That method, in the absence of any other prescribed by law, can only be the use and occupation of the lands for the purpose indicated in the act. As under acts of

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the first class the company will not acquire any
152 interest in the public lands until the plat shall be filed. So under acts of the second class no interest is acquired until the lands are occupied by the company. Under all acts regulating the sale of public lands the grantee is required to designate the part which he will take in order that it may be segregated from the general mass; it is so under homestead and pre-emption laws and all other laws for disposing of public lands unless
153 the acts of this class shall be regarded as an exception. Certainly there can be no hardship in requiring these companies in accepting the bounty of the government to conform to the general rule. Referring to a similar act the Supreme Court of California says:

"It was doubtless the purpose of the act merely to give a right to enter on the public lands, assuming them to be vacant, and its effect is to relinquish to the plaintiff (the R. R. Co.) any claim for compensation that might belong to the United States, as proprietor under any proceeding under the State law to appropriate the land for public
154 use." (Northern R. R. Co. *v.* Gould 21 Cala 260.) So here it may be said that the act of 1872 authorized the Company to go upon such of the public lands as should be found vacant and unoccupied, and appropriate them to the uses of their roads. In this sense it was a grant *in presenti*, but not otherwise, and any rights in the public lands secured by others under existing laws before any occupation or appropriation by the company,
155 must be respected by the latter.

In Central Pacific R. R. Co. *v.* Dyer, (1 Sawyer 641) this conclusion was apparently rejected upon

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grounds which are not stated, but I have not been able to adopt the views of the distinguished Judge who delivered the opinion in that case.

Having ascertained that no interest in the lands in controversy passed to the company under the act of 1872 until it should appropriate them to its own use, we have next to inquire whether there was in fact any such appropriation of the grand
156 cañon before the rival company set up a claim to it. On this point the company avers:

First. That in the years 1871–2 it surveyed and located its line through the cañon, and set substantial stakes upon it.

Second. That it did in the same years "in sundry places in and near said cañon grade and excavate the bed and line of its said railway."

Third. That about the year 1875 it completed its road from Pueblo to Cañon City.

If any of these acts afford evidence of occupa-
157 tion and appropriation by the company such as the public were bound to respect, its right was thereby established. That the surveying and staking does not afford evidence of that character is clear enough on reason and authority (Merritt *v.* Northern R. R. Co., 12 Barbour 606; Morris and Essex R. R. Co. *v.* Blair, 1 Stockton 635.)

As I had occasion to say some years ago in another case which arose under a similar act of Congress, the modern practice of surveying several routes in order to induce the people to give lands,
158 bonds or other aid, or give the right of way on favorable terms, in consideration of the building of the road on one or the other of the lines so surveyed, must tend strongly to discredit any such evidence of location. Indeed railroad companies,

in this country at all events, are constantly surveying new routes in an experimental way, and no one is disposed to accept anything less than the building of the road itself as evidence of a permanent location. As to the work alleged to
159 have been done "in and near" the cañon, it will be observed that the language of the bill is exceedingly vague. If a road bed was constructed for any considerable distance, which would in itself afford evidence of the character of the improvement, that would be an act of appropriation which no one could deny. But to overturn a few shovelfulls of earth here and there would not leave any intelligible sign of the company's occupation. The charge in the bill is entirely consis-
160 tent with very little work, and for the present purpose of determining the right to a preliminary injunction it must be regarded as insufficient. If at the hearing it can be shown that substantial work was done there another view may be taken of it. As to building the road from Pueblo to Cañon City, if before any adverse occupation of the cañon the company had shown a purpose to go on from the latter place, some weight might be given to it. With a line located and in process of construction from place to place no other com-
161 pany would be allowed to interfere, under an act even more vague and indefinite than that of 1872. But the company halted for three years at a town at the base of the mountains, which might be regarded as a permanent terminus. Meanwhile if reference may be had to a fact which is not in the pleadings but may be taken as belonging to the history of the country, the company reached the San Luis Valley by another line, and that is in

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the course of the line through the Grand Cañon
162 towards El Paso. These circumstances do not show a purpose to prosecute the work beyond Cañon City, but they tend in the opposite direction; and this must also be rejected as failing to show occupation and appropriation by the company.

At the time this controversy arose the land in and along the Grand Cañon was of the public domain and still subject to occupation and oppropriation under the act of 1872, if it had not been previously appropriated by the rival company.
163 That company is known in the pleadings as the Cañon City and San Juan Railway Company, and its corporate character is denied upon the ground that its certificate of incorporation is defective. The act of 1876 (11 Sess., 41) provides among other things to be set out in a certificate of incorporation, "the name of the town or the place and the county in which the principal office of the company shall be kept and the name of the county in which the principal business of the company shall be carried on."

164 A substantial compliance with this act was all that was required (Spring Valley Water Works *v.* San Francisco, 22 Cala., 434). As to the first clause requiring the office of the company to be designated the corporators of the San Juan Company declared in their certificate "the principal place of business of said company shall be Cañon City, in the said county of Fremont." In the case of a railroad company the "principal place of business" is obviously the "principal office."
165 With manufacturing corporations this may not be true, but a railroad company having business all

along its line has no *principal* place of business other than its general or principal office

As to the second clause of the act above recited, which requires the county in which the principal business will be carried on to be stated, it was sufficiently observed by stating the counties in which the road was located. As before observed,
166 the company will do business wherever the road may run, and its "principal business," if that can be separated from the general office, must be along the whole line of road. If this clause of the act has any application whatever to railroad companies it ought to be sufficient to state the counties through which the road will pass. It would seem idle to state separately after giving the location of the road in the certificate that the principal business of the company would be carried on in the counties of Fremont and Lake,
167 where the road would be built. The certificate is regarded as complying substantially with the act and therefore sufficient.

The act of 1868, on the same subject, (R. S. 118) under which the Rio Grande Company was organized was quite different. It required "the name of the town and county in which the operations of the said company shall be carried on" to be given; and the corporators of that company designated the principal office but did not attempt
168 to locate the "operations" of the company in any town or county. If any defect arose out of that omission it was probably cured by the act of Congress of 1872.

In the bill filed by the Rio Grande Company it is alleged that the defendant never did in fact survey any line through the cañon, and this if true

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may be of weight. The latter company, however, in its bill avers that the survey was duly made and the allegation is supported by a copy of the profile of the line which appears to be approved by the Secretary of the Interior. For the present
169 we must regard the survey and location of that line as having been made according to the act of 1875 (18 Stat., 482,) and sufficient to vest in the company the right to occupy and use the cañon for railroad purposes as against one claiming under the act of 1872.

That the Rio Grande Company may be admitted to the same right of way if there is room for two roads in the cañon seems to be clear, and perhaps that company may be entitled to use the track of the San Juan Company if there is room for but one road.
170 This last question may be passed for the present, and as to the first it is only necessary to say that both companies cannot go on with the work of construction at the same time in a narrow defile, such as the cañon is said to be—to permit it would be to perpetuate the conflicts which we were lately asked to surpress. If the San Juan Company must admit its rival to its right of way or to its track, that can only be done after its road has been built. In building its road through the cañon, however, due regard must be had to the
171 rights of the other company, and the line must be so located as to admit of the construction of another road, if that be possible. Under the act of 1875 one company cannot appropriate all the available ground in a cañon, pass or defile to the exclusion of another, if less than the whole will reasonably answer its purpose. To enforce this

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provision perhaps the court, upon proper demand therefor, should control the location and building of the first road to such extent as may be necessary to protect the rights of other companies who
172 may wish to use the same cañon. This question can be better considered at the term which is near at hand, and the parties may then be heard as to the proper course to be pursued. Until then the San Juan Company will be allowed to proceed with the work of grading the line only which will admit of change and correction without serious loss to the company. That is to say the company may proceed in its own way to grade the road, but we reserve the right to correct the location and grading upon complaint made to us by
173 the Rio Grande Company, if we find that we have power to proceed in that manner.

(Endorsed:) No. 154. Circuit Court U. S. The Denver and Rio Grande Railway Company *v.* The Atchison, Topeka and Santa Fe Railway et al. Opinion by Judge Hallet. Filed June 1st, A. D. 1878. Edward F. Bishop, Clerk. By Henry Sparnick, Deputy.

OPINION OF DILLON, J.

THE CAÑON CITY AND SAN JUAN RAILWAY COMPANY
vs.
THE DENVER AND RIO GRANDE RAILWAY COMPANY.

DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
EBENEZER T. ALLING.

Dillon, Circuit Judge.

The Denver and Rio Grande Company has the right to construct its railroad through the big cañon of the Arkansas under the act of Congress June 8, 1872.

The Cañon City and San Juan Company has
174 the like right under the act of Congress of March 3, 1875.

The first named company's right as against the last named company or any company duly organized was not complete and exclusive as to any part of the cañon until actual location and adoption of its line by corporate acts or action, followed by actual use and appropriation. That this was done by the first named company prior to March 3, 1875, does not appear with such certainty in the bill or pleadings as to afford a basis
175 for a judicial order in its behalf.

Assuming, therefore, at this stage of the cause,

that there was no consumated exclusive right in the Denver company at the time when the Cañon City company was organized, (February 15th, 1877). We have the case of a concurrent right in the two rival companies to construct their roads through the cañon, and to "use and occupy the cañon" for that purpose.

The second section of the act of March 3, 1875, contains a special provision, which, in the supposed state of facts, applies to these companies.

176 It provides that "*any* railroad, whose right of way or whose track or road bed upon such right of way passes through any cañon, pass, or defile shall not prevent any other railroad company from the use and occupation of the said cañon, pass or defile for the purposes of its road in common with the road first located or the crossing of other railroads at grade."

I concur in Judge Hallett's opinion that the pleadings as they stand do not show a state of facts which gives the Denver company any ex-

177 clusive right to the use of the cañon. *What* the proofs may hereafter show cannot, of course, be anticipated.

The cañon is alleged to be only forty-five feet in width at the narrowest portions.

It is alleged by the Denver company that not more than one railway with way of the width in the act of Congress granted ("one hundred feet in width on each side of the track,") can be constructed through said cañon.

178 But it does not appear that it is physically impossible to construct two lines of railway through the cañon.

The intent of Congress is plain that cañons

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and defiles in the public domain shall not be monopolized by one company. If there is room for two lines in this cañon, each company, so far as now appears, has the right to use and occupy the cañon for the construction of its road. Usually thirty feet in width, and even less, is
179 ample space for two parallel lines of railway track. If each company desires to construct its line through the cañon, each should be permitted to do so, if it is practicable.

If a centre line be drawn through the cañon one company should be restricted to the space on one side of that line and the other to the space on the other side of that line if this will allow of the construction of the two lines of railway in the cañon and no other course is more equitable.

180 If it is uncertain whether the course above suggested is practicable, *i. e.* whether there is space for the two lines of railway in the cañon, a commission of one or more disinterested enquirers can be hereafter sent by the court to report the facts to the court for its information.

If only one road can be constructed, then, on the pleadings and the present status of the case, I think the Denver Company is not entitled to an injunction against the Cañon City Company.

181 If both companies are ready to go forward to construct their roads immediately one company should not be permitted to adopt a route which will prevent the other company from an equal, fair and reasonable use of the cañon. "Equality is equity." Such are my general views as to the law of the case as is now presented.

The precise order that ought to be made at this time is somewhat uncertain by reason of an

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182 allegation by way of amendment to the bill of the San Juan Company which the demurrer admits. That amendment is as follows:

"Plaintiff further avers that by reason of the narrow and crooked course of said cañon, through the close or narrow part thereof, not more than one railway can be constructed through the said narrow part except by laying the track of one of said railways across the track of the other in many places, nor without great and constant haz-

183 ard of collisions between the trains operated on said two railways."

It may be taken sufficiently to appear as the case stands that both companies cannot go on with the work of construction at the same time.

It does not to my mind satisfactorily appear that there may not be room for two lines in all parts of the cañon.

The San Juan Company, as above held on the pleadings as they now stand, has the prior right

184 of occupation, and it may if it chooses go on with the work of grading and construction between this and the term (which occurs in a little more than a month), meanwhile to lay no iron until further orders and meanwhile the Denver Company to be enjoined. The Denver Company can then show that San Juan Company are proceeding improperly with a view unfairly to monopolize the entire route and to exclude it if such is the fact. We can then adopt such course and make such

185 orders as may appear to be right and just to each of the companies. Knowing our general views of their respective rights under the two acts of Congress, it may not be too much to hope that they may adjust the controversy by agreement.

ORDER, DEMURRER CONFESSED, LEAVE TO AMEND BILL.

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I recommend a temporary order in conformity with these views if Judge Hallett concurs.

(Endorsed:) No. 154. Circuit Court U. S. The Denver and Rio Grande Railway Company *vs.* The Atchison, Topeka and Santa Fé Railway et al. Opinion by Judge Dillon. Filed June 1st, 1878. Edward F. Bishop, clerk. By Henry Sparnick, deputy.

And afterwards and on the 5th day of July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of
186 said court, present the Hon. John F. Dillon, Circuit Judge, and the Hon. Moses Hallett, District Judge. The following proceedings were had in said court and in said cause, to-wit:

ORDER, DEMURRER TO BILL CONFESSED, LEAVE TO AMEND BILL.

THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY ET AL. } For an Injunction, &c.

At this day comes the said complainant by T. Macon, Esq., its solicitor, and the said defendants by W. Teller, Esq., their solicitor, also come.

And the demurrer of the defendants to the bill of complaint herein coming on now to be heard,
187 the said complainant, here in open court, saith that it will and doth confess that the said bill of complaint, and the matters and things therein set forth, are not sufficient in law for the said de-

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fendant to answer unto. Nevertheless on its motion;—

It is ordered that the said complainant have leave to file herein an amended and supplemental bill, as it shall be advised.

And afterwards and on, to-wit, the 6th day of July, A. D. 1878, came again the said complain-
188 ant, by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause its amendments to its said original bill in words and figures as follows, to-wit:

AMENDMENT TO BILL.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

In the Circuit Court of the United States for the District of Colorado. Of the July term, A. D. 1878.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
EBENEZER T. ALLING, M. N. MEGRUE, HENRY H. HOLBROOK, BENJAMIN F. ROCKAFELLOW, WILLIAM F. BAILEY, FRED. A. RAYNOLDS, WILLIAM R. MORLEY, AARON A. ROBINSON, JAMES CLELLAND, THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY, WILLIAM B. STRONG.

189 At this day comes the said plaintiff, and by leave of the court here further amends its said bill of complaint, filed in this court on the twenty-seventh day of April, A. D. 1878, as follows:

AMENDMENTS TO BILL.

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FIFTH AMENDMENT.

By inserting in the ninth folio of said bill, and next after the words "should complete fifty miles additional south of said point in each year thereafter," the words "and by the said act, and by a "certain other act of the Congress of the United "States, approved March 3rd., 1875, and entitled
190 "an act to correct a clerical error in an act grant-"ing the right of way through the public lands to "the Denver and Rio Grande Railway Company, "approved June 8th, 1872, plaintiff was recognized "as a lawful corporation from the date of its in-"corporation, under the laws of Colorado, and all "the powers, privileges and franchises by the said "laws conferred upon plaintiff were thereby ex-"pressly ratified, confirmed and legalized as exist-"ing from the date of its said incorporation."

SIXTH AMENDMENT.

191 Also by inserting in the fourteenth folio of said bill, and next after the words "near the mouth of the said cañon," the words following, to wit: "And two miles or thereabout, and no more dis-"tant therefrom; and the plaintiff further avers "that the said Cañon City is situated immediately "upon the said Arkansas River, and from the said "Cañon City to the mouth of the said South "Arkansas in the articles of association of plaintiff "mentioned, there is not nor ever was any practi-"cable route for the construction of plaintiff's rail-
192 "way, save through the said cañon of the Arkan-"sas, and neither at the said Cañon City nor in "the vicinity thereof, was or is there any railway

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"connection for the plaintiff's railroad, nor in the "valley of the said Arkansas River above the "said Cañon City, nor anywhere in the vicinity of "said Arkansas Valley was there at any time "heretofore, or is there any railway whatsoever, "either completed, begun or projected, save the "railroad of the said plaintiff, and the railroad of
193 "the said so-called Cañon City and San Juan "Railway Company; neither at the said Cañon "City, nor in the vicinity thereof, nor for eight "miles or thereabout below it, is or ever was there "any traffic sufficient to employ plaintiff's railroad "or any railroad whatsoever, nor is or ever was "there any prospect of such traffic derived from "the country about or tributary to the said "Canon City. Plaintiff further avers that the "valley of the said Arkansas River at the said "Cañon City and for eight miles or thereabout "below that doth not exceed in width one mile or
194 "thereabout, and without and beyond said valley "for the distance of twenty-five miles or there- "about therefrom, on the south side thereof, and "for the distance of forty-five miles or thereabout "from said valley on the north side thereof, and "above said Cañon City for the distance of thirty "miles or thereabout, always were and are, save "and except the Hardscrable and a few other like "narrow and poor valleys, only barren and sterile "mountain wastes, nor in all the said country, "save as aforesaid, is there any inhabited or pro-
195 "ductive country, and only by penetrating to the "valley of the Arkansas above the said cañon, "and thence to the valley of the Rio Grande "River, could or did the plaintiff ever expect to "make that part of its said railway reaching to

AMENDMENTS TO BILL.

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"Cañon City aforesaid, eight miles or thereabout "in length, of any value; all of which matters "are, and always since the year of our Lord 1875, "were well known to those acting as and assum- "ing to be the principal officers and managers of "said Cañon City and San Juan Railway Com-
196 "pany, or to some of them. Plaintiff further "avers that it hath always fully purposed and in- "tended to build and complete its said line of "railway from Cañon City through said cañon of "the Arkansas to the mouth of the said South "Arkansas, and thence by the line in its said "certificate of incorporation mentioned, to the "valley of the Rio Grande. Of all which the said "defendants, ever since the year of our Lord "1875, had notice."

SEVENTH AMENDMENT.

197 Also by striking out in the nineteenth folio of said bill the words "the said the defendants before named falsely claiming and pretending that they or some of them with others were" and inserting in lieu thereof "the said Atchison, Topeka and "Santa Fé Railway Company and the said William "R. Morley, Aaron A. Robinson, William B. "Strong, and others, its officers, agents, and ser "vants, acting for and in its behalf, falsely claiming "and pretending the said Cañon City and San "Juan Railway Company to be."

EIGHTH AMENDMENT.

198 Also by inserting in the said bill and next after the matter inserted by the fourth amendment here-

AMENDMENTS TO BILL.

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tofore filed thereunto the words following: "And "finally located through the said narrow part of "said cañon. And plaintiff upon information and "belief avers that if the said so-called Cañon City "and San Juan Railway Company ever did make "any survey of said railway through the narrow "part of said cañon, or locate or assume or attempt "to locate the line of said railroad through the "said narrow part or gorge of said cañon the same
199 "was not designated by stakes or monuments as "commonly practiced in like cases, or otherwise "certainly marked on the ground, or that if any "such survey of said line was made within the "said narrow part of said cañon the same was "made in the winter season, or when the said "river was in great part frozen and covered with "ice, and the stakes or monuments, if any were "set or placed to mark the said survey, were set and "placed in or upon the ice of said river, so that the "same necessarily were carried away by the high "water of the next following spring; and upon
200 "information and belief plaintiff avers that the "said so-called Cañon City and San Juan Railway "Company hath not, nor have any of the said de- "fendants, caused to be filed in the office of the "register of the land-office of the United States in the land district wherein the said Arkansas "Cañon is situate any plat or profile showing "upon what particular portion of the public domain "of the United States, or of the several sections, "quarter sections, or other subdivisions thereof, or "any of the said subdivisions, the said railroad of "the said so called Cañon City and San Juan Rail- "way Company is in any part located, and that "the said so-called Cañon City and San Juan Rail-

AMENDMENTS TO BILL.

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201 "way Company hath not, nor hath any one for it at "any time filed with the Secretary of the Interior "any copy of any articles of incorporation of it the "the said so-called Cañon City and San Juan Rail- "way Company, or any due proofs of its organiza- "tion under the same."

NINTH AMENDMENT.

Also by striking out from the said bill in the thirty-first folio thereof the words "the omissions, uncertainties and defects in and from the pretended certificate of incorporation of the said pretended Canon City and San Juan Railway Company, the said pretended corporation," and inserting in lieu
202 thereof the words "the premises, the said so-called "Cañon City and San Juan Railway Company."

TENTH AMENDMENT.

Also by striking out from said bill in the thirty-second and thirty-third folios thereof the words following, to-wit: "That in all the wrongful and oppressive conduct before set forth the said defendants Ebenezer T. Alling, M. N. McGrew, Benjamin F. Rockafellow, Henry F. Holbrook, William F. Bailey, Fred. A. Raynolds," and thence down to and including the words "and exclude
203 the engineers, laborers and servants of the plaintiff therefrom," as contained in the thirty fourth folio of said bill, and inserting in lieu thereof the following to-wit: "That the said Atchison, To- "peka and Santa Fé Railway Company and its "officers, agents and servants before mentioned in "and about the grading and construction of said "railroad are acting solely for the said Atchison,

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"Topeka and Santa Fé Railway Company, and not "for the said so-called Cañon City and San Juan "Railway Company; that the said railroad, if "completed, will be the road and property of the "said Atchison, Topeka and Santa Fé Railway
204 "Company, and not of the said so-called Cañon "City and San Juan Railway Company; that the "said last mentioned pretended corporation, if there "be any such corporation, hath not and will not "have, if all its stock shall be paid up, money sufficient to construct more than five miles of the "said line of railroad, as in the articles of association of said so-called Cañon City and San Juan "Railway Company mentioned. That, as plaintiff "is informed and believes, sixty thousand dollars
205 "or thereabout of the stock of said so-called Cañon "City and San Juan Railrway Company hath "already been issued, fully paid, solely for and in "consideration of the survey and platting of some "part of said line of railroad; that said so-called "corporation is, as plaintiff is informed and believes, without money or credit, and neither said "so-called corporation, or those assuming to be "the officers or members thereof, or any of them, "intend or expect, or ever did intend or expect to "build said railroad or any part thereof, but those "acting as and assuming to be such corporation
206 "associated themselves and assumed to form the "said so-called corporation, and now connive at "the wrongful acts of the Atchison, Topeka and "Santa Fé Railway Company, its agents and servants above mentioned, solely for the purpose of "inducing said Atchison, Topeka and Santa Fé "Railway Company to construct the said line of "railroad and with intent and expectation that the

AMENDMENTS TO BILL.

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"said last-named corporation, and not the so-
"called Cañon City and San Juan Railway Com-
"pany, shall own, control and operate the same.
"That said Atchison, Topeka and Santa Fé Rail-
207 "way Company is a wealthy corporation, and
"having migrated from the State of Kansas to the
"State of Colorado about the year of our Lord
"1876, envious of the plaintiff and covetous of
"its vested rights hath for a long time past arro-
"gantly threatened to absorb and swallow up the
"plaintiff; and now vainly supposing that its
"wealth and power will enable it to subvert right
"and justice, the said corporation in contempt of
"the several acts of Congress before recited and
"the laws and sovereignty of the State of Colo-
"rado is assuming and attempting to construct
208 "and operate a line of railway up the said Arkan-
"sas Valley, through the said cañon; and is using
"the name of the said pretended corporation, the
"Cañon City and San Juan Railway Company to
"conceal its invasion of the vested rights of the
"plaintiff; and though it hath not, and doth
"not control any line of railway nearer to
"said cañon than the city of Pueblo, forty miles
"or thereabouts from the said cañon of the Arkan-
"sas, the said Ebenezer T Alling, and the others
"aforenamed, his associates who are assuming to
"be and act as the said so called Cañon City and
209 "San Juan Railway Company, are fraudulently
"and collusively lending the name of the said
"pretended corporation, to enable the said Atchi-
"son, Topeka and Santa Fé Railroad Company to
"accomplish its unlawful purposes and interfere
"with and harass the plaintiff in its purpose
"long cherished, and only deferred by reason of

AMENDMENTS TO BILL.

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"its poverty to complete its said railroad to the "Rio Grande River by the route in its articles of "association mentioned."

ELEVENTH AMENDMENT.

Also by inserting in the thirty-fifth folio of said bill next after the words "exclude the plaintiff
210 therefrom," the words "unless plaintiff will con- "sent to enter into an unfair and extortionate "traffic contract with the said Atchison, Topeka "and Santa Fé Railway Company."

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY,
By H. A. RISLEY,
Solicitor, of Colorado Springs.

(Signed) R. F. WEITBREC, *Treasurer,*
Denver and Rio Grande Railway Company.

J. P. Usher, E. T. Wells, E. L. Smith, Thomas Macon, of counsel, of Denver, Cororado.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

Robert F. Weitbrec being first duly sworn says upon oath that he is the Treasurer of the Denver
211 and Rio Grande Railway Company, plaintiff in the above entitled cause, and hath been such officer of the plaintiff and acting as such during more than eighteen months last past, and during all that time, hath had, and now hath, the general control of the work of surveying and locating the line of said company's railway, and constructing said railway; and by reason of his said office,

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and his connection aforesaid with the business and affairs of said plaintiff, he hath acquired, and hath, as he verily believes a full and complete
212 knowledge of the matters set forth in the foregoing bill and the amendments thereto; that he hath heard read the said plaintiff's bill herein and the foregoing amendments thereto, and knows the contents thereof; and that all the matters of fact set forth in the said above amend-
213 ments are true; and that the said bill with the said above amendments is true to the knowledge of deponent, except as to those matters which are therein set forth upon the information and belief of the plaintiff, and as to those matters he hath been so informed and believes it to be true.

(Signed) ROBERT F. WEITBREC.

Subscribed and sworn to before me this 6th day of July, A. D. 1878.

(Signed) EDWARD F. BISHOP, *Clerk.*

(Seal of Circuit Court, U. S., Colorado.)

(Endorsed:) Circuit Court. The Denver and Rio Grande Railway Company *vs.* The Atchison, Topeka and Santa Fé Railway Company. Amendments to original bill. No. 5 to 11. Filed July 6th, A. D. 1878. Signed, Edward F. Bishop, clerk. H. A. Risley, solicitor.

214 And afterwards and on, to-wit, the 11th day July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Hon. John F. Dillon, circuit judge, and the Hon. Moses Hallett, district judge, the following further proceedings were had and entered of record in said court and in said cause, to-wit:

STIPULATION AS TO ANSWER, EVIDENCE, ETC.

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ORDER, DEMURRER TO AMENDED BILL OVERRULED.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY CO. ET AL.
} For an injunction.

215 At this day comes the said complainant by Thomas Macon, Esq., its solictor, and the said defendants by G. B. Reed, Esq., their solicitor, also come.

And the demurrer of the said defendants to the bill of complaint herein, as amended, having heretofore come on to be heard, and having been argued by counsel, and the court being now sufficiently advised in the premises.

It seemeth to the court here that the said bill of complaint as amended is sufficient in law for the said defendants to answer unto.

216 And afterwards and on, to-wit, the 12th day of July, A. D. 1878, came again the said defendants by C. E. Gist, Esq., their solicitor, and filed in said court and in said cause a certain stipulation as to answers, taking of evidence, &c, and the said stipulation is in words and figures as follows, to-wit:

STIPULATION AS TO ANSWER, TAKING OF EVIDENCE, &C.

UNITED STATES OF AMERICA,
EIGHTH JUDICIAL CIRCUIT,
DISTRICT OF COLORADO.
}

In the Circuit Court of the United States for the District of Colorado.

STIPULATION AS TO ANSWER, EVIDENCE, ETC.

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DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
E. T. ALLING ET AL.

217 Now come the parties to the above entitled cause by their respective attorneys and by leave of court first had and obtained, stipulate as follows:

That the answers of the several defendants herein may be filed on or before the incoming of court on Monday, July 15th, 1878, and that the corporate seal of the Atchison, Topeka and Santa Fé Railroad Company to its answer herein be and is hereby waived; and that the answers of all the said defendants may be subscribed by Charles E. Gast, Esq., their solicitor, and verified by him without prejudice to the effect of the clause in complainants bill waiving the oath to the answers of defendants.

218 That after issue framed, the evidence in the cause be taken in open court, and under the control and supervision of the court; and that the same be reduced to writing and reported by Henry Dennison, as examiner.

That the taking of the said evidence be commenced on Thursday, July 18th, 1878, and when so taken and reported, the same may stand and be considered as proof alike in this cause; and in the cause of the Cañon City and San Juan Railway Company against the Denver and Rio Grande Railway Company, now pending in this

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court, and involving the same matters of controversy.

219 (Signed,)

THE DENVER AND RIO GRANDE RAILWAY COMPANY.

By H. A. RISLEY, *Solicitor,*
Colorado Springs, Colorado.
CHARLES E. GAST,
Solicitor for Defendants.

(Endorsed:) No. 154. Denver and Rio Grande Railway Company *vs.* E. T. Alling *et al.* Stipulation. Filed July 12, A. D. 1878. Signed, Edward F. Bishop. By Henry Sparnick, Deputy.

And afterwards and on to-wit: the 16th day of July, A. D. 1878, came again the said defendants by Willard Teller, Esq., their solicitor, and filed in said court and in said cause the separate answers of Ebenezer T. Alling *et al.*, of William B. Strong, and Aaron A. Robinson, and of the

220 Atchison, Topeka and Santa Fé Railroad Company. And the separate answer of Ebenezer T. Alling *et al.*, is in words and figures as follows, to-wit:

SEPARATE ANSWER OF EBENEZER T. ALLING ET AL.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

In the United States Circuit Court, eighth judicial circuit, district of Colorado.

1 The joint and several answers of Ebenezer D. Alling, M. N. Megrew, Benj. F. Rockafellow, Henry N. Holbrook, Wm. F. Bailey, Fred. A.

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Raynolds, and James Clelland to the bill of complaint of the Denver and Rio Grande Railroad Company, plaintiff.

221 These defendants respectfully, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be taken to the many errors, uncertainties and imperfections in the said

2 bill contained for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

That they admit that they were some of them incorporators of the Cañon City and San Juan

222 Railway Company, and that they and all of them were trustees of said company for the first year thereof for the management of its business, and named as such in the certificate of incorporation of said company. And that they or some of them are now officers of the said Cañon City and San

3 Juan Railway Company and stockholders therein. And these defendants aver that save and except as officers and stockholders of said Cañon City and San Juan Railway Company they have no interest whatever in the matters in controversy herein.

That as to whether or not William J. Palmer, Alexander C. Hunt and William H. Greenwood,

223 on the 27th day of October, A. D. 1870, or at any other time, made a certificate in writing, &c., and became a body corporate under the name of the Denver and Rio Grande Railway Company, and for other purposes as in said bill alleged,

4 these defendants are not informed except as it is stated in said bill of complaint. And neither

admit nor deny the same but require strict proof thereof. And as to whether or not the said plaintiff ever became duly and legally incorporated, and now is an existing and legally constituted corporation these defendants are not informed, and neither admit nor deny the same but require strict proof thereof.

224 These defendants, further answering, admit that on or about the 8th day of June, A. D. 1872, the Congress of the United States passed a certain act granting to the Denver and Rio Grande Railway Company the right of way over the public domain
5 of the United States one hundred feet in width on each side of a certain track to be thereafter located and constructed together with lands adjacent thereto for the uses and purposes of said railway as is in and by said bill of complaint alleged.

225 And defendants admit that by the terms of said act of Congress plaintiff was to, and should complete its road to a point on the Rio Grande as far south as Santa Fé, in the Territory of New Mexio, in five years from the passage of said act, and should complete fifty additional miles south
6 of said point in each and every year thereafter.

And defendants admit that by an act of Congress of March, A. D. 1877, the time in which said railway company should complete its railway to a point on the Rio Grande as far south as Santa Fé was extended to ten years.

226 And these defendants aver that in and by the pretended certificate of incorporation of said plaintiff, and in and by said acts of Congress confering the right of way to said plaintiff for the construction of its said roads as in said certificate of incorporation described. The main line of

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7 said road was to be run from the town of Pueblo up the valley of the Arkansas River to Cañon City, thence up said Arkansas River to the mouth of the South Arkansas River, thence through Poncho or Marshall's pass over and into San Luis Valley to some point on the Rio Grande, thence down said river to El Paso, &c.

227 And these defenants further answering say that as to whether or not at the time of the passage of the said first act of Congress the said pretended certificate of the incorporation of plaintiff was

8 matter of record in the said Territory of Colorado, and whether or not the alleged purposes for which the said plaintiff claimed to be incorporated, and the route pretended to be claimed for the construction of said railway were well known to the President and Congress of the United States, these defendants are not informed and neither admit nor deny the same, but require strict proof thereof.

228 These defendants further answering admit that at the time of the passage of the said first act of Congress the Grand or Big Cañon of the Arkansas River was, and that the same still is through-

9 out its entire length on the public domain of the United States. And these defendants admit that the said Grand or Big Cañon, for a distance of about one and a fourth miles, is very narrow, and that the same is enclosed by high and precipitous walls on each side thereof. And that as to whether or not for the said distance of one and one-fourth miles there is only room for the con-

229 struction of one line of railway, at the same level or elevation, they neither admit nor deny but re-

10 quire proof thereof, but aver the fact to be that

for all the balance of the distance through said Grande or Big Cañon there is ample room for two lines of railway.

And these defendants further answering deny that at the time of the passage of the said two acts of Congress, the President of the United States or the said Congress of the United States had any knowledge whatever of the length, width or physical characteristics of the said Grand Cañon, or had any knowledge whatever in regard to the
230 same or knew whether it would accommodate one or more than one railway.

11 And these defendants further answering admit that previous to the years 1871 and 1872 the said plaintiff did locate and construct a railway from the city of Denver to the town of Pueblo, and admit that said plaintiff did survey and locate a railway from the said town of Pueblo to Cañon City in the county of Fremont, and admit that the said plaintiff at some subsequent time did construct a railway from the said town of Pueblo to within a mile or two miles of said town of Cañon City, and deny that said plaintiff at the
12 date in the said bill mentioned or at any other
231 time surveyed or located any line of railway through the Grand or Big Cañon of the Arkansas River to or in the vicinity of the mouth of the South Arkansas River. And deny that it did upon the ground aforesaid make and designate a location of any railway by good and substantial stakes; and deny that the said plaintiff did at any point between the said Cañon City and the said mouth of the said South Arkansas River, or in the said cañon, grade and excavate the bed of a
13 contemplated railway. But on the contrary aver

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232 the fact to be that if any survey whatever was made through, over or upon said ground, that the same was but a preliminary survey for the purpose of comparing the merits of said route with other comtemplated routes to reach the same point upon the said Rio Grande. And further aver the fact to be that the said plaintiff never at any time graded and excavated a road bed on said line with the intention of constructing a railway or for any purpose whatever, but that the said plaintiff after having run a preliminary sur-
14 vey as aforesaid in 1871 through said Cañon and
233 over said ground, quit and abandoned said route and cañon and ceased to build, excavate or construct any railway upon the route aforesaid but changed and altered the route of said railway and commenced at the said town of Pueblo to build and construct the main line of its road in a general southwesterly direction from said Pueblo to and through Veta Pass in the Sangre de Christo Range of Mountains, and have built and constructed and are now operating said road to a point on the Rio Grande called Alamosa, in the
15 said San Luis Valley, and are now building and
234 constructing said line of railway down the said Rio Grande Valley and toward the City of Santa Fé. And defendants aver that the said road so built and so being constructed is the same comtemplated and proposed to be built by the said company in the said pretended certificate of incorporation of said plaintiff for the purpose of reaching some point on the Rio Grande as far south as Santa Fé and the said town of El Paso.

And defendants are informed and believe and
16 therefore aver that plaintiff has no intention to

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235 construct a railway through said Grand Cañon of the Arkansas River and over the line designated in said pretended certificate of incorporation, so as to connect the same with its line of road at the said town of Alamosa or at any other point so as to form a continuous line of railway from Pueblo through said Cañon City and by the way of the South Arkansas River, thence through to El Paso and thus construct the line of railway designated in said plaintiff's pretended certificate of incorporation. But on the contrary aver the
17 fact to be that said plaintiff is holding said pre-
236 tended line for the purpose of injuring these defendants and extorting money from them, or for the purpose of extending their railway to some other or different locality and point than those mentioned in and contemplated by its said pretended certificate of incorporation.

And these defendants further answering deny that on or about the 19th day of April, A. D. 1878, or at any other time the said plaintiff had procured and obtained by subscription to its capital stock or in any other manner money
18 sufficient for or for the purpose of constructing a road through the big cañon of the Arkansas
237 River as a part or parcel of the line contemplated by said certificate of incorporation or any other line of railway.

And these defendants deny that said plaintiff on or about the 19th day of April, 1878, or at any other time began to construct a railway from a point near Cañon City through the Grand Cañon of the Arkansas River. But aver the fact to be that on or about the said 19th day of April, A. D. 1878, while the Cañon City and San Juan Rail-

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19 way Company were in the actual possession of
238 the said Grand Cañon for the purpose of constructing its railway through the same, and had a large force of laborers employed for the purpose, and in the actual occupation of said Grand Cañon the said plaintiff, with a large force of armed men, and for the purpose of expelling, intimidating and dispossessing the said Cañon City and San Juan Railway Company of said cañon, entered into the same and by the use of firearms and threats and by the destruction of the work of
20 said company, for a long time damaged and de-
239 layed the said Cañon City and San Juan Railway Company in the prosecution of said work.

Defendants further answering admit that on or about the 15th day of February, A. D. 1877, Ebenezer T. Alling, John Locke and M. N. Megrew did make and caused to be filed in the office of the Secretary of State of the State of Colorado their certain certificate, setting forth that they had associated themselves together for the purpose of forming a corporate body under the laws of the State of Colorado to build, con-
21 struct and operate a railroad, and that the name of the company was the Cañon City and San
240 Juan Railway Company, and that the objects and purposes of said company were to construct and maintain and operate a railroad between Cañon City, in the County of Fremont, and the South Arkansas Post-Office, in the County of Lake, in the State of Colorado, commencing at Cañon City, thence up the Arkansas River through the Grand Cañon of the same, thence to the said South Arkansas Post Office, and that the number of trustees for the first year should be nine, com-

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posed of the persons named in said plaintiff's complaint.

22 And defendants deny that said certificate of
241 incorporation was defective and void as is in and by said bill stated but on the contrary aver that the same was and is a full compliance with the law and that the said parties by the making and filing of said certificate became duly and legally incorporated for the purposes in said certificate mentioned. And defendants hereto attach a certified copy of said certificate of incorporation as evidence of such facts, marked "Exhibit A," and which defendants pray may be made a part of this answer.

23 And these defendants further answering aver that as individuals and aside from the Cañon City
242 and San Juan Railway Company neither they nor either of them claim any rights whatever, and are not, nor are any of them, in an individual capacity or as associates doing or performing any work upon said line or any part thereof, or in any manner holding, possessing or occupying the same.

And these defendants further answering say and aver that long after the said plaintiff had abandoned said route and after it had as hereinbefore stated constructed its line of road over another
24 and different route towards its destination, the Cañon City and San Juan Railway Company pro-
247 ceeded to and did as it legally might do, under the provisions of a general act of Congress, approved March 3, 1875, "*entitled an act granting to railroads the right of way through the public lands of the United States*," prior to the 28th day of April, A. D. 1877, locate its said road for the distance of twenty miles from said Cañon City up

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the Arkansas River and through the Grand Cañon of the same, and did on the said 28th day of
25 April, A. D. 1877, and immediately after the location of the same make a profile of the same which was on the 22d day of June, A. D. 1877, ap-
248 proved by the honorable the Secretary of the Interior. And afterwards, on the 28th day of July, A. D. 1877, the same was deposited in the United States land office in the City of Pueblo with the register of said office; and thereupon, by and under the provisions of said act of Congress, the said Cañon City and San Juan Railway Company became legally entitled to the right of way
26 through the public lands of the United States for the distance of twenty miles upon the line so located.

Defendants further answering admit that on the 19th day of April, A. D. 1878, the Cañon City and San Juan Railway Company did with a large
249 force of men and laborers enter upon said line of road and commenced to build and construct and grade the same. And aver that the same was upon its own line of road as before that time legally located, and aver that they have good and legal right so to do, and that the same was
27 done for the purpose of building, constructing and operating a railroad under the provisions of its charter.

And defendants deny that upon that date the plaintiff was prepared and was about to resume the construction of its railroad under its pretended charter but aver, as is hereinbefore stated, that the object of said plaintiff was to take forcible posses-
250 sion of the said line located by said Cañon City and San Juan Railway Company and illegally and

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forcibly prevent it from occupying, possessing and constructing a line of road.

And these defendants deny that they or any or
28 either of them as individuals have ever held or possessed, or claimed to hold and possess, said line of road or any part thereof, and deny that they or either of them, or the Cañon City and San Juan Railway Company, have ever at any time threatened or attempted to forcibly dispossess the plaintiff, or any of its employés, of the narrow part of said cañon or any part thereof, and deny that they have any intention of so doing.

251 And these defendants deny that they or either of them or the Cañon City and San Juan Railway Company are or has been constructing any grade
29 or building any road upon any line located, staked and designated by the plaintiff in the years 1871 and 1872, or at any other time.

And these defendants further answering aver the fact to be that the said Grand or Big Cañon of the Arkansas River is not the only feasible and practicable route by which a road can be constructed from Cañon City up said river, but that the same can be built by two or three practicable routes without materially increasing the length
252 of said road and without increasing the cost of construction; and that plaintiff and its officers
30 and agents are fully informed of this fact by reason of surveys recently made.

And these defendants further answering deny that the said Cañon City and San Juan Railway Company did not cause the line of road by them located to be staked through the narrow part of said cañon, called by the plaintiff the "Box" thereof, but on the contrary aver that every part

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thereof, for the full distance of twenty miles, was duly and properly staked at the time of such location and a profile and map thereof made.

31 And these defendants deny that they or any
253 of them or the Cañon City and San Juan Railway Company have or do threaten to dispossess and drive out the employés of the plaintiff.

And defendants further answering deny that the said Cañon City and San Juan Railway Company did not file or cause to be filed with the Register of the United States land office in the land district wherein said Grand Cañon is situated any plat or profile of its said line of railway as by it located. But on the contrary aver that a due
32 and proper plat or profile as required by law was duly filed as is hereinbefore stated. And these defendants deny that the said Cañon City and
254 San Juan Railway Company did not file with the Secretary of the Interior any copy of its articles of incorporation, or proper proofs of its organization under the same, as is in and by said bill stated, but on the contrary aver that the same was filed with the honorable Secretary of the Interior.

And these defendants further answering aver that at the time of the location of the said line of the Cañon City and San Juan Railway Company
33 as hereinbefore stated, from Cañon City aforesaid, up the said Arkansas River for the said distance of twenty miles, the same was through the public
255 land of the United States, and that the said location was not made through any military park or Indian reservation or other lands specially reserved from sale.

And these defendants deny that they, or any of them, or the Cañon City and San Juan Railway

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Company have combined or confederated with the said Atchison, Topeka and Santa Fé Railway Company in any manner whatever.

And these defendants further answering deny
34 that the Atchison, Topeka and Santa Fé Railway Company or its officers, agents or servants, or any of them, as such, are engaged in building and
256 constructing the road through the Grand Cañon of the Arkansas River, but on the contrary aver that the said road is being built and constructed by the Cañon City and San Juan Railway Company and its officers, agents, servants and employees, and deny that the said railroad, so being built through the said Cañon by the said Cañon City and San Juan Railway Company, will be, when completed, the road and property of the Atchison, Topeka and Santa Fé Railway Com-
35 pany, but on the contrary aver that the same, when completed, will be the road and property of the said Cañon City and San Juan Railway Company.

257 And defendants further answering admit that at the time the said Cañon City and San Juan Railway Company commenced to build and construct such railroad it had not sufficient money to construct and equip the same, but denies that it was without money or credit, but on the contrary avers that it had money sufficient to commence such work, and had good credit, and was by
36 reason of such credit able to procure the money necessary for the construction of said road. And defendants aver that in the building and constructing of railroads it is not necessary, nor has it been for a long time considered necessary, that the
258 company proposing to construct should have at

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the commencement of its enterprise sufficient funds in its treasury to build and construct such road, and that nearly if not all roads are built upon the credit of the company, security upon the road and by the assistance of others.

37 And these defendants deny that the sum of sixty thousand dollars, or thereabouts, of the paid up stock of said company has been issued solely for, and in consideration of the survey and plating of said road, but admit that some of the moneys of said company have been used for such purpose. And aver that the same were necessary and proper expenditures.

259 And these defendants further answering deny that the said Cañon City and San Juan Railway and its officers and members do not intend and expect and have not intended and expected to build said railroad and every part thereof. And

38 to the contrary aver that the said Cañon City and San Juan Railway Company were incorporated in good faith, and having secured the right of way for its said road have at all times honestly intended to build and construct said road, and expected so to do, and now is building the same and intends and expects to complete the same as and for itself, and not for the said Atchison,

260 Topeka and Santa Fé Railway Company, as is in and by the said bill of complaint falsely alleged.

These defendants further answering deny, as

39 they have before denied, that they are, or that the Cañon City and San Juan Railway Company is animated solely or in any degree by a desire to injure the said plaintiff or prevent it from extending its line of road. And again denies that it is assisting the said Atchison, Topeka and Santa

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Fé Railway Company in building a road. And denies that the said Atchison, Topeka and Santa Fé Railway Company is building or intending to build any railway over the ground in controversy herein.

261 And defendants admit that the said Cañon City and San Juan Railway Company intend to build
40 a railroad through the Grand Cañon, and if possible, by legal means, to secure the traffic of the valley of the Arkansas above the said cañon. And aver that the said Cañon City and San Juan Railway Company have not asked said plaintiff to enter into any traffic contract extortionate or otherwise when the said road shall be completed. Defendants admit that the Atchison, Topeka and Santa Fé Railway Company has large means, but denies that the said company is in any way in-
262 fluencing or holding out inducements to the inhabitants of Cañon City. And denies that the said Atchison, Topeka and Santa Fé Railway
41 Company have a large force, or any force whatever, of laborers in its employ at and in the vicinity of said Big Cañon. But on the contrary avers that all the laborers so employed at the places named, and in the construction of said road, are the laborers and employés of the Cañon City and San Juan Railway Company.

And these defendants further answering say that they are informed and believe, and therefore
263 aver the fact to be that the said plaintiff is and
42 for a long time past has been insolvent, and that it has no means to build a road through the Grand Cañon, and has not intended and does not now intend to build and construct a road through said Grand Cañon but entered into said cañon for

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the purpose of extorting money from said Cañon City and San Juan Railway Company. And defendants are informed and believe and aver the fact to be that the litigation and controversy herein is not being carried on in the interest of,
43 or at the expense of said plaintiff, but that the
264 said plaintiff and its lines of road are under the control of others who are furnishing money and using the name of the plaintiff to wrong and injure the said Cañon City and San Juan Railway Company.

And further answering aver, as hereinbefore averred, that the said William B. Strong and Aaron A. Robinson in the construction of said railroad are the officers and agents of the Cañon City and San Juan Railway, and are acting in that capacity and in no other. And as to the defendant William R. Morley these defendants aver
44 that he was for a time in the employ of the Cañon City and San Juan Railway Company as an assist-
265 ant engineer, and was in no other way connected with said road, and that such employment has ceased, and that the said Morley is no wise connected with the construction or interested in said road.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged without this that there is any other matter or thing in the said complainant's said bill of complaint contained
45 material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or
266 belief of these defendants; all of which matters

and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct. And they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) By CHAS. E. GAST,
Solicitor for Defendants.

G. B. Reed and W. Teller, of counsel.

Chas. E. Gast being duly sworn according to law deposes and says that he is the solicitor of the above-named defendants; that he has read the above answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which
267 are therein stated to be on information and belief, and as to those matters he believes them to be true.

(Signed) CHAS. E. GAST.

Subscribed and sworn to before me this 15th day of July, 1878.

[NOTARIAL SEAL.] (Signed) R. F. LYTLE,
Notary Public.

EXHIBIT "A."

Know all men by these presents, that the undersigned Ebenezer T. Alling, John Locke and M. N. Megrue, of Cañon City, Fremont County, Colorado, have associated themselves together for the purpose of forming a corporate body under and by virtue of the provisions of the general incorporation laws of the State of Colorado, the same being contained in chapter eighteen (18) of the Revised Statutes of the Territory (now State)

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268 of Colorado, approved January 10th, 1868, and the acts amendatory thereto, and to carry on the business of a railroad company under the provisions granted by the laws aforesaid for the specific purposes hereinafter set forth.

I. The name of the company shall be "*the Cañon City and San Juan Railway Company.*"

II. The objects and purposes of said company are to construct, improve and maintain a railroad to carry passengers and freight between Cañon City, in the county of Fremont, and the point known as the South Arkansas Post-office, in the county of Lake, in the said State of Colorado, commencing at the company's depot site in Cañon

269 City, to be hereafter selected; thence up the valley of the Arkansas River through the Grand Cañon thereof; thence by the most practicable route following the Arkansas River to the point known as the South Arkansas Post-office, in the county of Lake aforesaid, with full power and authority to buy lands and tenements and to receive the same by gift or demise for the successful, convenient and profitable running of the said railroad and for depots, side tracks and work shops, and for any and all other purposes that may be desirable or profitable, with full power to convey, alien and encumber the same in whole or in part and to sell the stock of the company.

270 III. The termini of said railroad shall be Cañon City, in said county of Fremont, and the point known as the South Arkansas Post-office, in the said county of Lake, in the State of Colorado.

IV. The capital stock of said company shall be one hundred thousand dollars, to be divided into one thousand shares of one hundred dollars each.

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V. The principal place of business of said company shall be Cañon City, in the said county of Fremont.

VI. The number of trustees of said company who shall manage the business concerns of said company for the first year shall be nine (9), and
271 shall consist of the following named persons, to-wit, Ebenezer T. Alling, James Clelland, Henry R. Holbrook, Benjamin F. Rockafellow, John Locke, M. N Megrue, and William F. Bailey, Fred. A. Raynolds, Sam. P. Dale.

VII. The officers of said company shall consist of a president, secretary and treasurer, and until a regular election is held, as provided by law, Ebenezer T. Alling shall be president, Benjamin F. Rockafellow shall be secretary, and James Clelland shall be treasurer.

VIII. The term of existence of said company shall be twenty (20) years.

272 IX. The trustees shall have the power to make such by laws and regulations, from time to time, as in their judgment shall be advisable for the successful management of the affairs of the said company.

X. An impression of the seal adopted by the said company as its corporate seal adopted is hereto attached (L. S.)

In witness whereof we, the undersigned, have hereunto set our hands and seals this 15th day of February, 1877.

EBENEZER T. ALLING. [SEAL.]
JOHN LOCKE. [SEAL.]
M. N. MEGRUE. [SEAL.]

ARTICLES OF INCORPORATION C. C. & S. J. R'Y.

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STATE OF COLORADO,
County of Fremont, ss:

I, John Wilson, a county clerk in and for said County and State, do hereby certify that Ebenezer T. Alling, John Locke, and M. N. Megrue, who
273 are known to me to be the persons whose names are subscribed to the foregoing certificate of incorporation, personally appeared before me and acknowledged that they signed and sealed the said instrument of writing as their free act and deed for the uses and purposes therein expressed.

Given under my hand and official seal this 15th day of February, 1877.

[L. S.] JOHN WILSON, *County Clerk.*

STATE OF COLORADO,
Secretary's Office, ss:

I, William M. Clark, Secretary of the State of Colorado, do hereby certify that the foregoing is a correct transcript of the certificate of incorporation of the Cañon City and San Juan Railway
274 Company, which was filed in this office the nineteenth day of February, A. D. 1877, at 9:30 o'clock a. m., and admitted to record.

In testimony whereof I have hereunto set my hand and caused the great seal of the State to be affixed this twenty-second day of April, A. D. 1878.

[STATE SEAL COLORADO.]

(Signed) WM. M. CLARK,
Secretary of State.
By E. WALDEN BREWSTER,
Deputy.

No. 154. In Circuit Court. Denver and Rio Grande Railway Company *vs.* Ebenezer T. Alling

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et al. Answer of Alling and others. Filed July 16, A. D. 1878. Signed, Edward F. Bishop, clerk. C. E. Gast, G. B. Reed, Willard Teller, solicitors for defendants.

275 And the said separate answer of William B. Strong and Aaron A. Robinson is in words and figures as follows, to-wit:

SEPARATE ANSWER OF WILLIAM B. STRONG AND A. A. ROBINSON.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO } ss.

In the United States Circuit Court, eighth judicial circuit, district of Colorado.

1 The joint and several answers of William B. Strong and Aaron A. Robinson to the bill of complaint of the Dever and Rio Grande Railway Company plaintiff:

276 These defendants now and at all times hereinafter saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise they may have, or that can or may be taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

2 That they are informed and believe, and therefore aver the fact to be that on or about the 19th day of April, A. D. 1878, the plaintiff had not prepared and was not about to resume the con-

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277 struction of a road from Cañon City, or near there, through the Grand Cañon of the Arkansas River; and that the said plaintiff had neither the money nor intention of constructing said road.

And further answering say that after the Cañon City and San Juan Railway Company had located their said road through the said cañon, and had

3 obtained means for construction of the same, and had taken possession of the said line in said Grand Cañon, and with a large force of men had commenced the construction of same, the plaintiff with a large force of armed men attempted by

278 force to evict and dispossess said company, and, as these defendants are informed and believe, for the sole purpose of extorting money from the said Cañon City and San Juan Railway Company, compelling it to purchase the right of way to construct said road from said plaintiff; and that such

4 entry on the part of said plaintiff was not for the purpose nor made with the intention of constructing a road.

And these defendants further answering say that at the day and date in said bill of complaint mentioned, to-wit, the 19th day of April, A. D.

279 1878, they were employés of the Atchison, Topeka and Santa Fé Railway Company; and admit that on the date last mentioned they were assisting in the location and construction of the road of the Cañon City and San Juan Railway Company through the Grand Cañon of the Arkansas River, but deny that they were so engaged as the agents

5 and officers of the said Atchison, Topeka and Santa Fé Railway Company, and aver that they were so acting, and on behalf of the said Cañon City and San Juan Railway Company.

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280 And deny that such possession was taken or such construction commenced by, or for the said Atchison, Topeka and Santa Fé Railway Company, but aver that the same was done by, for and on account of the said Cañon City and San Juan Railway Company, and for the purpose of constructing the road of said company, to be owned, operated and controlled by said Cañon City and

6 San Juan Railway Company.

And these defendants further answering aver that they are officers of the said Cañon City and San Juan Railway Company, and that as such

281 officers, and not otherwise, they are engaged in the construction of the road of said company through the said Grand Cañon. And admit that there is a large number of men employed in the construction of said road. And these defendants deny that said Cañon City and San Juan Railway Company are occupying any surveyed or located lines of any road occupied or appropriated by the plaintiff.

7 And these defendants further answering deny, as they have before denied, that they are acting in the construction of said road solely for the Atchison, Topeka and Santa Fé Railway, as is in and by said bill alleged, but on the contrary aver that they are acting for the said Cañon City and

282 San Juan Railway Company as its officers and agents, and not otherwise.

And these defendants deny that the said road, when completed, will be the property of the said Atchison, Topeka and Santa Fé Railway Company, and on the contrary aver that the said

8 road, when completed, will be the road and property of the said Cañon City and San Juan Railway Company.

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And defendants further answering deny that the said plaintiff always fully proposed, and intended to build and complete its line of railway from Cañon City through the cañon of the Arkansas River to the mouth of the South Arkansas River, and thence by the line in its said certificate of in-
283 corporation mentioned to the valley of the Rio Grande, and thence down said river to a point opposite Santa Fé, etc., but on the contrary aver that the said plaintiff long since abandoned such
9 route for the line of its main road, and have now constructed said road through Veta Pass, in the Sangre de Christo range of mountains, and from Pueblo to Alamosa, a point on the said Rio Grande, in San Luis Valley. And that plaintiff is now constructing the said main line of road, or is about to commence the construction of said line from the said town of Alamosa, on said Rio Grande, south, and down the valley of said Rio
284 Grande River toward Santa Fé, and on the route designated in said plaintiff's certificate of incorporation. And these defendants are informed
10 and believe, and therefore aver the fact to be that the said plaintiff had not, on the said 19th day of April, A. D. 1878, nor for a long time previous to that time had, and has not since that time had any intention, and now has no intention to build a line of road from said Cañon City through the said Grand Cañon of the Arkansas River up to the mouth of the said Arkansas River, thence through Poncho or Marshall's pass into the said
285 San Luis valley to some point on the Rio Grande,
11 and thence down, on the course of said river, to intersect its present line of road at Alamosa, or at any other point, or in any other way, along the

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course in said certificate of incorporation mentioned, so that the same shall be part and parcel of its main line, as in and by its said certificate designated.

And defendants further say that they are informed and believe, and therefore aver that the said plaintiff's road, if the same shall be built from said Cañon City through the said Grand Cañon will not be, and is not intended by said
12 plaintiff to be a part of its said main line of road,
286 but a separate and distinct road, only connecting with such road at the town of Pueblo.

And these defendants further answering say that they are informed and believe, and therefore aver the fact to be that the said plaintiff is insolvent, and has no money whatever for the construction of said road, and is using its pretended rights and name solely for the benefit of others, and not for its own use and benefit.

And these defendants deny all and all manner
287 of unlawful combination and confederacy where-
13 with they are by the said bill charged, without this, that there is any matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided is true to the knowledge of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and humbly prays to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

288 (Signed) By CHAS. E. GAST, *Solicitor.*

G. B. Reed and W. Teller, of counsel.

SEPARATE ANSWER OF A. T. & S. F. R'Y.

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STATE OF COLORADO,
Pueblo County, ss:

A. A. Robinson being first duly sworn according to law deposes and says that he is one of the above named defendants, that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to such matters he believes them to be true.

(Signed) A. A. ROBINSON.

Subscribed and sworn to this 15th day of July, 1875.

[L. S.] (Signed) R. F. LYTLE,
Notary Public.

289 (Endorsed:) No. 154. In Circuit Court. Denver and Rio Grande Railroad Company *vs.* Ebenezer T. Alling and others. Answer of Strong and Robinson. Filed July 16, A. D. 1878. Signed, Edward F. Bishop, clerk. By Henry Sparnick, deputy. Gast, Reed and Teller, for defendant.

And the said separate answer of the Atchison, Topeka and Santa Fé Railroad Company is in words and figures as follows, to-wit:

SEPARATE ANSWER OF THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

290 *In the United States Circuit Court, eighth judicial circuit, district of Colorado.*

1 The answer of the Atchison, Topeka and Santa

SEPARATE ANSWER OF A. T. & S. F. R'Y.

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Fé Railway Company, a corporation organized and existing under the laws of the State of Kansas, to the bill of complaint of the Denver and Rio Grande Railway Company plaintiff.

This defendant, now and at all times hereafter saving and reserving to itself all and all manner of benefit or advantage of exception, or otherwise, it may have, or that can or may be taken to the many errors, uncertainties and imperfections in
291 said bill contained for answer thereto, or so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering,
2 says:

That it denies that on the 19th day of April, A. D. 1878, or at any time, this defendant, acting through its officers and agents, William B. Strong, Aaron A. Robinson and William R. Morley, or in any other manner, with a large force of servants and laborers, or with any force whatever, or with any number of servants or laborers, enter
292 into or occupied any part of the Big or Grand Cañon of the Arkansas River, or the mouth
3 thereof; and deny that this defendant at the time aforesaid, or at any other time did, with any laborers or servants, or in an any manner, begin to grade, excavate and construct a line of railroad from the mouth of said cañon or toward the narrow part thereof, or upon, or over any part of the territory in the said bill described; and denies that it did in any manner or way begin to construct or locate a railroad grade upon any ground in the said bill of complaint described.

293 And this defendant further answering denies
4 that it is now occupying, or ever has with its servants or laborers, or in any manner occupied the

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said Grand Cañon of the Arkansas River, or any part thereof; and denies that it is now engaged in constructing a line of railway upon the line or ground in the said bill described; and denies that it has ever threatened or intended or ever intends to either forcibly, or in any other manner, dispossess, or in any way interfere with the said plaintiff, as it has in the said bill of complaint alleged against it.

294 And this defendant further answering avers the
5 fact to be that on or about the said 19th day of April, A. D. 1878, the Cañon City and San Juan Railway Company, a corporation duly organized and incorporated under the general incorporation laws of Colorado, having before that time duly and legally acquired the right of way through the said Grand or Big Cañon of the Arkansas River, and having located its line through the same, entered into and upon the land and premises in the said bill of complaint described for the purpose of constructing the lines of railway in its
295 certificate of incorporation described, and desig-
6 nated as it legally might do, and that said Cañon City and San Juan Railway Company, with its agents, servants and employés, commenced to build, excavate and construct said road.

And this defendant avers that the said Cañon City and San Juan Railway Company is a corporation separate and distinct from this defendant, and admits that W. B. Strong and Aaron A. Robinson are officers of this defendant, and that they are now engaged, and have been since the said 19th day of April, A. D. 1878, engaged in assist-
296 ing the Cañon City and San Juan Railway Company in constructing its line of railway through

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7 the Grand or Big Cañon of the Arkansas River.

But aver the fact to be that the said Strong and Robinson are also officers of the said Cañon City and San Juan Railway Company, and that all the acts of the said Strong and Robinson in the premises have been done and performed by them as officers and agents of the said Cañon City and San Juan Railway Company and not as the officers, agents or servants of this defendant.

297 And this defendant further answering denies that it or its officers, agents or servants are acting

8 in the grading and construction of said railway for this defendant, or are acting in any manner whatever; but aver the fact to be that the construction of said road and all the acts complained of in said bill of complaint are the acts of the said Cañon City and San Juan Railway Company and are not the acts of this defendant; and deny that the said line of railway, when the same shall be completed, will be the property of this defendant, but on the contrary aver that the same will

298 be the property of the Cañon City and San Juan Railway Company.

9 And this defendant further answering admits that it is a wealthy corporation, and avers that it expects to derive profit and advantage by the completion of the road of the Cañon City and San Juan Railway Company, and by connecting its present lines with the same, and by the increased business of its said roads by reason of the completion of said road, and such construction, and admits and avers that it has furnished money to the said Cañon City and San Juan Railway Company, as it lawfully might do, for

298 the construction of the said road, and avers its

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10 intention and willingness to further assist the said Cañon City and San Juan Railway Company with money to construct said road.

And this defendant further answering denies that it is constructing, or assuming or attempting to construct and operate a line of railway up the Arkansas Valley through the said cañon, and denies that it is using the name of the Cañon City and San Juan Railway Company at all, or for any purpose whatever. And defendant
299 further avers that it has the means to do so, and
11 intends to furnish the money to build and operate a line of road from the present terminus of its line at Pueblo up the valley of the Arkansas River, and connect the same with the line of the Cañon City and San Juan Railway Company at Cañon City, so as to receive the benefit of the traffic over and upon the said Cañon City and San Juan Railroad.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this,
300 that there is any matter, cause, or thing, in the said complainants said bill of complaint con-
12 tained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges, in this behalf most wrongfully sustained.

(Signed) By CHAS E. GAST, *Solicitor.*

G. B. Reed and W. Teller, of counsel.

SEPARATE ANSWER OF A. T. & S. F. R'Y.

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301 STATE OF COLORADO,
Pueblo County, ss:

Chas. E. Gast being first duly sworn according to law deposes and says that he is the solicitor of defendant, the Atchison, Topeka and Santa Fé Railway Company; that he has read the foregoing answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated to be on information and belief, and

302 as to such matters he believes them to be true.

(Signed) CHAS. E. GAST.

Subscribed and sworn to before me this 15th day of July, 1878.

[NOTARIAL SEAL.] (Signed) R. F. LYTLE,
Notary Public.

(Endorsed:) In Circuit Court. Denver and Rio Grande Railroad Company *vs.* Ebenezer T. Alling. Answer of Atchison, Topeka and Santa Fé Railway Company. Filed July 16, A. D. 1878. Signed, Edward F. Bishop, clerk. By Henry Sparnick, deputy. Gast, Reed and Teller for defendants.

303 And afterwards and on, to-wit, the 19th day of July, A. D. 1878, came again the said complainant by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause the replication to answer of Alling et al, the replication to answer of Strong and Robinson, and the replication to answer of the Atchison, Topeka and Santa Fé Railway Company, and the said replication to the answer of Alling et al is in the words and figures as follows, to-wit:

REPLICATION TO ANSWER OF EBENEZER T. ALLING ET AL.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO.

Of the July term, A. D. 1878, of the Circuit Court of the United States within and for the district of Colorado.

304 The replication of the Denver and Rio Grande Railway Company to the joint and several answer of Ebenezer D. Alling, M. N Megrew, Benjamin F. Rockafellow, Henry H. Holbrook, William F. Bailey, Fred. A. Raynolds, and James Clelland.

This repliant, saving unto itself all advantage of exception to the manifold insufficiencies of the said answer for replication thereto, saith that it will aver and prove its said bill to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied to by this repliant; without this that any other matter, or thing in said answer contained, material or
305 effectual, in the law to be replied unto, confessed and avoided, traversed and denied, is true. All which this repliant is and will be ready to aver and prove, as this honorable court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY.
By H. A. RISLEY, *Solicitor*,
Colorado Springs, Colorado.

Wells, Smith, and Macon, of counsel.
J. P. Usher, of counsel.

REPLICATION TO ANSWER OF STRONG AND ROBINSON

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(Endorsed:) No. 154. Circuit Court. Denver and Rio Grande Railway Company *vs.* the Atchison, Topeka and Santa Fé Railway Company et al. Replication to answer of Alling et al. Filed July 19, A. D. 1878. Signed, Edward F. Bishop, clerk. By Henry Sparnick, deputy. Risley, Wells, Smith, and Macon.

306 And the said replication to the joint and several answer of William B. Strong and Aaron A. Robinson, is in words and figures as figures as follows, to-wit:

REPLICATION TO JOINT AND SEVERAL ANSWER OF WILLIAM B. STRONG AND AARON A. ROBINSON.

UNITED STATES OF AMERICA }
DISTRICT OF COLORADO. }

In the United States Circuit Court of the District of Colorado. Of the July term, A. D. 1878.

The replication of the Denver and Rio Grande Railway Company to the joint and several answer of William B. Strong and Aaron A. Robinson.

307 The repliant saving unto itself all advantage of exception to the manifold insufficiences of the said answer for replication thereto saith that it will aver and prove its said bill to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied to by this repliant, without this that any other matter or thing in said answer contained, material or

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effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which this repliant is and will be ready to aver
308 and prove, as this honorable court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY,
By H. A. RISLEY, *Solicitor*,
Colorado Springs, Colorado.

Wells, Smith, and Macon, of counsel.
J. P. Usher, of counsel.

(Endorsed:) No. 154. Circuit Court Denver and Rio Grande Railway Company *vs.* The Atchison, Topeka and Santa Fé Railway Company et al. Replication to joint several answer of William B. Strong and Aaron A. Robinson. Filed July 19th, A. D. 1878. Signed, Edward F. Bishop, Clerk. By Henry Sparnick, Deputy. Risley, Wells, Smith, and Macon.

309 And the said replication to answer of the Atchison, Topeka and Santa Fé Railway Company is in words and figures as follows, to-wit:

REPLICATION TO ANSWER OF THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY.

UNITED STATES OF AMERICA, }
DISTRICT OF COLORADO. }

Of the July Term, A. D. 1878. Of the Circuit Court of the United States within and for the District of Colorado.

The replication of the Denver and Rio Grande

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Railway Company to the answer of the Atchison, Topeka and Santa Fé Railway Company.

310 The repliant, saving unto itself all advantage of exception to the manifold insufficiencies of the said answer for replication thereto, saith it will aver and prove its said bill to be true, certain and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied to by this repliant; without this that any other matter or thing in said answer contained, material or effectual, in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which this repliant is and will be ready to aver

311 and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

(Signed) THE DENVER AND RIO GRANDE RAILWAY COMPANY.

By H A RISLEY, *Solicitor*,
Colorado Springs, Colorado.

Wells, Smith and Macon, of counsel.
J. P. Usher, of counsel.

(Endorsed:) No. 154. Circuit Court. Denver and Rio Grande Railway Company *vs.* the Atchison, Topeka and Santa Fé Railway Company et al. Replication to answer of the Atchison, Topeka and Santa Fé Railroad Company. Filed July 19, A. D 1878. Signed, Edward F. Bishop, clerk. By Henry Sparnick, deputy. Risley, Wells, Smith, and Macon.

312 And afterwards and on, to-wit, the 22d day of July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878,

ORDER, HEARING COMMENCED AND CONTINUED.

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of said court, present the Hon. Moses Hallett, district judge, the following order was had and entered of record in said court and in said cause, to-wit:

ORDER, HEARING BY THE COURT.

THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY ET AL. — For an Injunction, &c.

At this day comes the complainant by T. Macon, Esq., its solicitor, and the said defendants by Chas. E. Gast, Esq., their solicitor, also come.

313 And this cause now coming on to be heard upon the bill of complaint as amended, the several answers thereto, and the replication of the complainant, the hearing of oral testimony is continued to the hour of adjournment.

And afterwards and on the 23d day of July, A. D. 1878, the following additional order was had in said court in said cause, and entered of record, to-wit:

ORDER, HEARING CONTINUED.

THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY CO. ET AL. — For an injunction.

314 At this day come again the said parties by their attorneys respectively, and thereupon the hearing

of testimony herein is resumed and continued to the hour of adjournment.

And afterwards and on this same day came again the said complainant by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause a stipulation as to oral testimony, which said stipulation is in words and figures as follows, to-wit:

STIPULATION AS TO ORAL TESTIMONY.

In the Circuit Court of the United States, Eighth Circuit, District of Colorado.

315 DENVER AND RIO GRANDE RAILWAY COMPANY,
vs.
E. T. ALLING ET AL.

It is hereby stipulated by and between the parties to the above cause that the evidence of the witnesses taken in open court may be reduced to writing by Henry Denison, Esq., as heretofore stipulated, and that the same need not be subscribed and sworn to by the several witnesses after the same is reduced to writing. That the evidence so taken and reported may be certified by the court as correct and then filed as part of the record of this cause.

(Signed) WELLS, SMITH & MACON,
Attorneys for Complainants.

(Signed) CHARLES E. GAST,
Solicitor for Defendants.

316 (Endorsed:) No. 154. Denver and Rio Grande Railway Company *vs.* E. T. Alling et al. Stipu-

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lation as to oral testimony. Filed July 23, A. D. 1878. Signed, Edward F. Bishop, clerk. By Henry Sparnick, deputy.

And afterwards and on, to-wit, the 24th day of July, A. D. 1878, came again the said defendants by Chas. E. Gast, its solicitor, and filed in said court and in said cause, a stipulation as to testimony, which said stipulation is in words and figures as follows, to-wit:

STIPULATION AS TO TESTIMONY.

UNITED STATES OF AMERICA,
STATE OF COLORADO.

317 *In the United States Circuit Court, Eighth Judicial Circuit, District of Colorado.*

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
CAÑON CITY AND SAN JUAN RAILWAY COMPANY ET AL.
In chancery.

It is hereby stipulated by and between the parties hereto by their respective solicitors, that the following letters respectively, to-wit, letter of June 12th, 1877, from Hon. U. J. Baxter, acting Commissioner of the General Land Office, Washington, D. C., letter of June 26th, 1877, from Hon. J. A. Williamson, acting Commissioner of the General Land Office, Washington, D. C., and letter of July 13th, 1877, from Hon. U. J. Baxter, acting Commissioner of General Land
318 Office, each directed to the Register and Receiver

STIPULATION AS TO LETTERS, MAPS, ETC.

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of the United States Land Office at Pueblo, Colorado, shall be received as evidence in the above case, to the extent of their contents, respectively, without further proof of their genuineness, and no objection or exception shall be taken on the ground that that they are not the best evidence of the facts contained, and it is further stipulated that the map offered in evidence, purporting to be a copy of a map approved by Hon. C. Schurz, Secretary of the Interior, is a correct copy of the map approved by the Hon. Secretary of the Interior, a copy of which is on
319 file in the United States Land Office at Pueblo, Colorado, and it is also hereby stipulated and admitted, on the part of the said plaintiff, that the right of way of the Cañon City and San Juan Railway Company, as entered upon such map, was entered upon the township plat of the local land office at Pueblo, Colorado.

G. B. REED,
Solicitor for Defendants.

(Signed) WELLS, SMITH AND MACON,
Attorneys for D. and R. G. Ry. Co.

(Endorsed:) No. 154. Circuit Court, United States. Denver and Rio Grande Railway *vs.*
320 Cañon City and San Juan Railway et al. Stipulation as to testimony. Filed July 24th, A. D. 1878. Signed, Edward F. Bishop, clerk. Gast, Reed and Teller, for defendants.

And afterwards and on, to-wit, the 24th day of July, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Hon. Moses Hallett,

ORDER, HEARING CONTINUED AND CLOSED.

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district judge, the following order was had and entered of record in said court and in said cause, to-wit:

ORDER, HEARING CONTINUED.

DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE CAÑON CITY AND SAN JUAN
321 RAILROAD COMPANY ET AL.

In chancery. For injunction, &c.

At this day come again the said parties by their solicitors, respectively; and thereupon the hearing of oral testimony in this cause is renewed and continued to the hour of adjournment.

And afterwards and on the 7th day of August, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Hon. Moses Hallett, district judge, the following additional order was had in said court and in said cause and entered of record, to-wit:

ORDER, HEARING CLOSED.

322 THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY ET AL.

In chancery. Injunction.

At this day comes the said complainant by T. Macon, Esq., its solicitor, and the said defendants by Chas. E. Gast, Esq., their solicitor, also come; and thereupon the hearing of testimony herein is closed.

ORDER TAKEN UNDER ADVISEMENT.

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And afterwards, and on the 8th day of August, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Hon. Moses Hallett, district judge, the following additional order was had in said court and in said cause and entered of
323 record, to-wit:

THE DENVER AND RIO GRANDE RAILWAY COMPANY *vs.* THE ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY ET AL.	In chancery. For injunction, &c.

At this day come again the said parties by their solicitors respectively.

And thereupon the arguments of counsel are by the court heard, and thereafter this cause is taken under advisement.

And afterwards an on, to-wit, the 12th day of August, A. D. 1878, a certain report and certificate of the oral testimony heard upon the hearing in said cause and reduced to writing was filed in said court and in said cause, and the said report and certificate of testimony is in words and figures
324 as follows, to-wit:

The United States of America,
DISTRICT OF COLORADO.

IN THE

CIRCUIT COURT OF THE UNITED STATES

—FOR THE—

DISTRICT OF COLORADO,

OF THE JULY TERM, A. D., 1878.

THE DENVER AND RIO GRANDE RAILWAY CO.
Plaintiff.

vs.

EBENEZER T. ALLING, et al.,
Defendants.

In Equity.

A report of the depositions of witnesses produced sworn and examined, and the documentary evidence given, as well in behalf of the plaintiff as the defendants, in the above entitled cause, in open Court, before the Hon. Moses Hallett, District Judge of said District presiding, and under the control and supervision of said Court, on the twenty-second, twenty-third and twenty-fourth days of July, A. D. 1878, pursuant to the stipulations of counsel, filed in said Court on the 12th day of July, A. D. 1878, and on the ..... day of ....., 1878.

TESTIMONY FOR PLAINTIFF.

Present, Thomas Macon, Esq., of counsel, with the said plaintiff, Gilbert B. Reed, Esq.; Willard Teller, Esq., of counsel, with the defendants, and Charles E. Gast, Esq., defendants' solicitor.

Present, also, Henry L. Denison, named in the stipulation of counsel, and by whom said depositions were reduced to writing.

Present, also, the following named witnesses, respectively. And, thereupon, the following named witnesses being each severally sworn according to law in open Court, the following interrogatories were propounded by counsel, and the objections thereunto, below stated, were made, and the rulings and opinions of the Court below set forth were given by the Court upon such objections respectively, and the witnesses severally deposed as follows, to wit:

ON THE PART OF SAID PLAINTIFF.

M. N. Megrue, being duly sworn, deposed as follows:

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1 Ques. Where do you reside?

Ans. Cañon City, Fremont county.

Ques. What position do you hold, if any, in the Cañon City and San Juan Railway Company?

Ans. I am one of the directors

Ques. How long have you been one of the directors?

Ans. Since the organization of the company.

Ques. Were you one of the orginal incorporators?

Ans. Yes, sir.

Ques. What is the capital stock of that company?

Ans. I could not answer that, sir.

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Ques. I mean by that, what is it limited at in the certificate?

Ans. Yes, sir; I understand what you mean, but I don't remember.

2 Ques. How many shares of stock, or what proportion of stock is now disposed of?

Ans. Could not tell that, either.

Objected that this is immaterial, irrelevant and not the best evidence; the amount of the capital stock should be shown by the certificate of incorporation, or in some manner.

Ques. What amount of money is there now in the treasury, so far as you know, of the Cañon City and San Juan Company?

Objected to as immaterial, and there is no issue on that. Objection sustained.

The Court. Parties may be working for them,
3 without any prospect of getting anything, as men do frequently who work for railroad companies: in that way it would not affect the validity of their acts.

Ques. State for what purpose the Cañon City and San Juan Railway Company was organized.

Objected. The certificate of incorporation is the best evidence; it shows for what purpose.

Mr. Macon proposed to show that the certificate of incorporation did not express the true object of the company.

4 The Court: I don't think you can go into that, sir. Suppose they all had met together, and resolved they would do something entirely different, and then sat down and signed the certificate, what would that signify? We should take the certificate to be the exponent of their purpose, as

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to their particular intention at the time of making this certificate certainly can not be the subject of inquiry here. Suppose, on the other hand, they
5 should attempt to show that your Company, eight or ten years ago, all entertained a different purpose from what was then expressed in their certificate, certainly no one would contend that the Court should sit here and hear such evidence as that.

Ques. What is the Cañon City and San Juan Railway Company now doing towards building a road through the Grand Cañon of Arkansas?

Ans. Well, they have men at work there now, as I understand it.

Ques. Under whose control and management are these men at work in the Grand Cañon?

6 Ans. Do you mean to say who has direct charge of them; I understand Mr. Robinson the chief engineer has charge of them

Ques. What position does Mr. Robinson hold in the Atchison and Topeka Company?

Objected to as immaterial.

Objection overruled.

Ans Well, I have only a general understanding of that, and that he is the chief engineer of the Atchison and Topeka Road, I don't know that positively—general understanding

Ques. Mr. Robinson has the immediate charge of the men now engaged in completing this work in the Cañon?

Ans. He has the immediate charge as I understand it, yes sir.

Ques. Who pays those men for their work, and

who pays Mr. Robinson for his services immediately?

Objected to as immaterial.

Objection overruled.

Ans. I am acting as a director, yet I admit I am not thoroughly conversant with all the work-
7 ings of the company, but as I understand Mr. Robinson attends to that part as chief engineer, and that they are paid through the Cañon City and San Juan Railway Company.

Ques. The Cañon City Railway Company pays through Mr. Robinson?

Ans. Yes, sir.

Ques. Where does the Cañon City and San Juan Railway Company get its money from, from what source?

Objected to.

Objection overruled.

Ans. I understand it is from the sale of the bonds of the Cañon City and San Juan Railway Company.

8 Ques. You understand. Have you ever seen one of those bonds?

Ans. Yes, sir.

Ques. When were those bonds executed?

Ans. Well, I don't just understand what is the meaning of the question.

Ques. When were those bonds of the Cañon City and San Juan Company executed?

Ans. I could not answer that definitely, if I understand it, the stock and the bonds are the same thing in this case, are they not?

Ques. No.

Ans. Then I will take it back, and will say stock instead of bonds.

Ques. From the stock of the company then?

Ans Yes, sir.

9 Ques. You don't know of any bonds ever having been issued by the company?

Ans No, sir.

Ques. From what source, from what individual, or company does this money come into the possession of the Cañon City and San Juan Company? From whom do they get it, borrow it, or otherwise?

Ans. I don't know.

Ques. As a director you know of no arrangement between your company and any other company or individuals for the borrowing of money to be used in the construction of that road?

10 Objected to.

Objection sustained.

Ques. What arrangement, if any, do you know of having been made between the Cañon City and San Juan Company, or between any individual or company for money to be used in the construction of this railroad in the Grand Cañon?

Ans. Well, as I understand it, I am simply director, I suppose the secretary and treasurer would understand these things better than I do, but as I understand it, it has been made from sale of stock.

11 Question repeated.

Ans. I don't know of any other than that, the sale of stock.

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Ques. How much of this stock do you own Mr. Megrue?

Objected to as immaterial.

Objection overruled.

Ans. I own one share.

Ques. How much did you pay for it?

Ans. A hundred dollars a share.

Ques. Shares of stock issued in certificates of one hundred dollars each?

Ans. Yes, sir.

Ques. How much did you pay for this?

Ans. Well, it would be a hundred dollars.

Ques. How much did you actually pay in money or services for this one share of stock?

11 Ans. I didn't pay anything in money for it.

Ques. Anything in services?

Ans. Yes, sir.

Ques Service as a director?

Ans. Yes, sir.

Ques. Now you may state what services as director you have performed up to this time?

Ans. I believe I have attended all their meetings except one.

Ques. How many meetings have there been?

Objected to as immaterial.

Objection overruled.

Ans. I could not tell, I have a memorandum
12 here from which I could tell though—six is all I have any knowledge of.

Ques. At any of those meetings has there been any corporate action taken for the raising of money for the building of this road?

Objected, not the best evidence, not the way to prove corporate action.

Ans. As I understand they opened the books for the subscription of stock, and sold the stock to raise the money.

Ques. That is the only?

Ans. That I know of, yes, sir.

13 Ques. State if you know how much of the stock of your company was issued in payment for the survey of your route through the Grand Cañon and up the Arkansas River?

Ans. I would not be positive about it, but I remember of one of ten thousand dollars, and it may be more, but that I don't remember distinctly.

Ques. When was the construction of this railroad by the Cañon City Company, as you term it, begun?

Ans. That is, when was the work begun, do you mean to say? I will refer to a memorandum I have, here—on the 19th of April.

Ques. Of the present year?

14 Ans. Yes, this is the building only, the survey was begun long ago.

Ques. As one of the directors of this Company attending its meetings, how long before the 19th of April did you have the last meeting, to the best of your recollection, and where was it?

Ans. (Referring to memorandum). It is April the 10th.

Ques. What business was transacted at the time at that meeting?

Objected to.

Objection sustained.

Ques. What, if any, business was transacted at that time having reference to the immediate

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construction of your road through the Cañon?

15 Ans. Well, I can only answer that by answering the first question you asked. I believe I would say not any.

Ques. When did you elect your officers last?

Ans. It was the 10th of April, I think.

Ques. Now, as one of the directors of this Cañon City and San Juan Company, when did you first become aware that the Cañon City and San Juan Railway Company was building a road in, or through, the Grand Cañon?

Ans. I think it was the 18th or 19th of April.

16 Ques. From whom did you get your first information on the 19th day of April that your Company was then about to proceed to place men in that Cañon to work?

Ans. If it was on the 19th, I think it was either the 18th or the 19th, I got it from Mr. Clelland.

Ques. What arrangements, if any, had the Denver and Rio Grande Railway Company made on that day, before you saw Mr. Clelland, to go into that Cañon?

Objected to, sustained.

17 Ques. How many men were put to work on the 19th of April by your Company, as you understand it?

Objected to as immaterial, objection overruled.

Ans. I do not know.

Ques. Under whose charge were the men, put to work on the 19th of April, working on that day?

Ans. As I understand it, it was under Mr. Clelland.

Ques. Who was the engineer, I meant?

Ans. That I don't know.

Ques. Do you know a man named W. R. Morley?

Ans. Yes, sir.

Ques. When did you first see and know him?

Ans. Well, it has been two or three years ago.

18 Ques. When did you first see him in Cañon City?

Ans. Well, I could not tell you that; it was prior to the 19th of April, though.

Ques What connection before the 19th of April had he with the Cañon City and San Juan Company?

Ans. I could not be positive about that; I don't know whether he was on the survey or not.

Ques. At this time you don't know of his holding any position in the Cañon City and San Juan Company?

19 Ans. No, sir.

Ques. Did you see him on the 19th of April?

Ans. No, sir.

Ques. Did you see him on the next day?

Ans. No, sir.

Ques. Do you know of his coming into Cañon on the 19th of April?

Ans. I heard of it; but I don't know of it.

Ques. I will ask you what, if anything, do you know of any contract between the Cañon City and San Juan Company and the Atchison and Topeka Railway Company by which the Cañon City and San Juan Company is to be furnished with

20 money by the Atchison and Topeka Railway Company for the construction of that road?

Objected to: first for the firm, and second, the

substance; it assumes that there is an agreement.

Objection overruled.

Ans. I do not know of any.

Ques. As one of the directors, I will ask you plainly who is to own that road through the Grand Cañon, that railroad when the same is constructed, as it is now being constructed and under the management of the present construction ?

21 Ans. Well, I suppose the stockholders of the Canon City and San Juan Railway Company.

Ques. Has there ever been an estimate of the expense of the building of the first twenty miles of that railroad furnished the company by its engineer.

Objected to as immaterial.

Overruled.

Ans. Not to my knowledge. It may have been done.

Ques. A survey has been made has it, under the direction of the Canon City and San Juan Company ?

Ans. Yes sir, and I have no doubt but what he may have made the report, but it is not to my knowledge.

Ques. Who is the Treasurer of your company ?

22 Ans. Mr. James Clelland.

Ques. Do you know the expense of the construction of the road as far as it has gone up to this time ?

Ans. No sir, I do not.

Ques. Have any estimates at all ever been laid before your company to your knowledge ?

Ans. We have the surveyor's report, the only thing I have ever seen.

Ques. So far as it has been constructed, the

expense of the work done now?

Ans. No sir, not that I know of.

Ques. Has your company held any meetings since the 10th of April?

Ans. Yes sir.

Ques. Have you attended them?

Ans. Yes sir.

23 Ques. And there has been up to this time no estimates of the expense of the work laid before your company?

Ans. I think the 19th of April was the last meeting we held, but I won't be positive about that.

Ques. The day the road was begun?

Ans. Yes sir.

Ques. How many men, or about how many men were set to work on this road by your company as you understand it up to the 25th of April?

Ans. I don't have anything of a correct idea, at all.

Ques. I will get you to conjecture.

Objected to.

Objection sustained.

Ques. I will ask you if there were as many as three hundred?

Objection sustained.

24 Ques. I will ask you where the laborers engaged on the construction of this Cañon City and San Juan railroad came from, where were they brought from, when they were put upon the work?

Objection immaterial.

Overruled.

Ans. I could not tell.

FOLIO

Ques. Were they to any extent gathered up from about Cañon City?

Ans. The first men that we set at work there were gathered up from Cañon City.

Ques. My question has reference to the majority of the force that were put upon that work before they were stopped by the injunction.

Ans. The majority of the men were not gathered there.

25 Ques. Who brought those men there, what company? Your company or some other company?

Ans. Well, as I understand it, they came there under Mr. Robinson.

Ques. How were they transported there?

Ans. It would be a difficult matter for me to tell.

Ques. Were they brought on the railroad, or did they come in wagons?

Ans. I think the majority of them came in wagons.

Ques. Whose teams were they so far as you know that brought the majority of the men to the cañon?

Ans. I don't know.

Ques. Do you know they belonged to the Cañon City and San Juan Company?

Ans. No sir.

26 Ques. What direct agency had the Cañon City Company in bringing those men into that place, and putting them at work about the 19th of April, or from the 19th to the 25th of April last?

Ans. I do not know.

Ques. As a director you took no action to-

wards putting those men in that cañon at all, did you?

Ans. No sir.

Ques. After those men were brought there and put in that cañon, and up the river to work, constructing this Cañon City and San Juan Railroad, as you call it, what control, management or direction, if any, did the Cañon City and San Juan
27 Railway Company exercise over these men?

Objected to.

Objection overruled.

Ans. As I understand it, the Chief Engineer had charge of them. I would like to refer to the question that was asked just before this. (Shorthand writer read.)

Ques. As a director you took no action towards putting those men in that cañon at all, did you?

Witness. I didn't answer correctly there, it was at the meeting on the 19th, we had a meeting to put those men at work there. We called
28 a meeting of the directory for the purpose of putting those men to work on the 19th.

Ques. You say those men. How many men, about; how many did you put in that day?

Objected to as immaterial.

Plaintiff's Counsel. I want to show that out of seven or eight hundred the Cañon City Company put in thirteen.

Objection sustained.

Ques. What action, if any, was taken by your company from the 19th to the 25th of April last toward advertising for men to work on that railroad?

Objected to as immaterial.

Objection overruled.

Ans. I think all that was done by the Chief
29 Engineer.

Ques. Of the Cañon City and San Juan or Atchison and Topeka?

Ans. Chief Engineer of the Cañon City and San Juan Railway Company.

Ques. Don't you know that advertisements were signed by Mr. A. A. Robinson as Chief Engineer of the Atchison, Topeka and Santa Fé Railway Company offering two dollars and a-half a day for men?

Ans. I don't remember that I ever saw any.

Ques. Don't you know they were stuck up all over that town and at the hotel and elsewhere?

Ans. Yes, I know they were stuck up there, but I don't remember who signed them, and Mr.
30 Robinson was elected Chief Engineer of the Cañon City Company. Hands witness notice beginning, "Wanted."

Ques. You saw that: when was he elected so: see if that is the Cañon City and San Juan Company, or is it the Atchison, Topeka and Santa Fé?

Ans. Well, it doesn't say.

Ques. What does it say? Objected to, the paper itself is better evidence,

Ques. He is not Chief Engineer of your company this time, is he?

Ans. That is my understanding. Yes sir.

Plaintiff offers in evidence hand-bill as follows:

"WANTED:—Five hundred men to work on the construction of the A. T. and S. F. R. R. Inquire at Clelland's and the Post Office. Wages,
31 $1.50 per day and board. A. A. ROBINSON,
Chief Engineer of Construction."

TESTIMONY FOR PLAINTIFF.

FOLIO

Ques. Since the 19th day of April, 1877 has the Cañon City and San Juan Company, as a Company, as a corporation, ever made a payment to the men employed in constructing this railroad in the Grand Cañon of the Arkansas?

Ans. I don't know anything about that, I don't have anything to do with it—that part of it.

CROSS-EXAMINATION OF MEGRUE.

Ques. You said Mr. Robinson was Chief Engineer of the Atchison, Topeka and Santa Fe Company; you also stated he was Chief Engineer
32 of the Cañon City and San Juan Railway Company?

Ans. I said I understood he was Chief Engineer of the Atchison, Topeka and Santa Fe.

Ques. State, if you know, when he was elected Chief Engineer of the Cañon City and San Juan Railway Company?

Ans. To the best of my recollection it was on the nineteenth of April.

Ques. At the time work commenced?

Ans. Yes sir.

Ques. You say the men that went to work were under the charge of Mr. Clelland, what position did Clelland occupy in your Company?

Ans. He was Treasurer.

Ques. You say you don't know anything in
33 regard to Mr. Morley. Do you know what Mr. Morley is by profession?

Ans. I understand, engineer.

Ques. Who has charge of the engineering department and the construction of your road?

Ans. Mr. Robinson.

Ques. If Mr. Morley was acting as an engin-

eer, he was acting under Mr. Robinson, was he not?

Ans. I don't know.

Ques. Mr. Robinson at that time had charge of the road, did he not?

Ans. He was elected on the 19th, yes sir.

Ques. Before that, I understand you say the work was under the charge of Clelland the Treasurer.

Ans. Yes, the beginning of the work was.

Ques. You say that you own one share of the
34 stock, and you paid no money for it, that you got it for services. Try and recollect that matter, and refresh your memory and see if you didn't get it from Mr. Rockafellow?

Ans. I got it from Mr. Rockafellow, yes sir.

Ques. Full paid stock?

Ans. Yes Sir.

Ques. Settled with Mr. Rockafellow for it?

Ans. Yes sir, I gave him a receipt for it.

Ques. Do you know how Mr. Rockafellow got the stock?

Ans. Well, yes, I know how I understand he got it, he got it for services and office rent, and so on, rent of building.

Ques. Didn't the Company rent an office from
35 Mr. Rockafellow?

Ans. Yes sir.

Ques. And paid him in stock for the use of the office?

Ans. That is my understanding of it.

Ques. And you obtained your stock from him?

Ans. Yes sir.

Ques. What other officers, if any, aside from

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the directors were elected on the 19th of April, besides the chief engineer and directors; what other officers besides Mr. Robinson, if any, were elected on the 19th?

Ans. I don't remember.

Ques. Was not Mr. Strong elected on that date?

Ans. I could not say positively, sir.

Ques. Was he not elected on that date, general manager?

36 Ans. I believe he was, yes sir.

Ques. What other position did Mr. Strong hold in the Company, if any?

Ans. I don't remember of any other.

Ques. Was he not a director, was not Mr. Strong elected director on the tenth?

Ans. I think he was, but I would not say positively, I would have to refer to minutes of the book?

RE-EXAMINATION OF MEGRUE.

Ques. You say you got your certificate, one share of stock from Mr. Rockafellow, and gave him a receipt for it; did you get it from Mr. Rockafellow as an individual, or as the Secretary of the

37 Cañon City and San Juan Railway Company?

Ans. Well, as I understand it, I got it from him as Secretary of the Cañon City and San Juan Railway Company.

Ques. You did not trade for it, or buy it from him as his private property?

Ans. No sir.

Ques. You say the Company rented an office of Mr. Rockafellow, what building?

Ans. The building you used to occupy as an office.

TESTIMONY FOR PLAINTIFF.

FOLIO

Ques. How long did they occupy that room as an office for the Company.

Ans. I could not tell you, it was for a good while.

Ques. You don't remember how much it come to, do you?

38 Ans. No sir.

Ques. The room was worth about four dollars a month for rent?

Ans. I don't have any idea. Question objected to.

Ques. Mr. Robinson was elected on the 19th of April you say, after this building began, and when do you say Mr. Strong was elected a director?

Ans. I said at the time I didn't remember distinctly but I do since I spoke of it, that Mr. Strong was elected on the 10th day of April.

Ques. At the regular meeting?

Ans. Yes sir.

EBENEZER T. ALLING, SWORN.

Ques. What position, if any, do you hold in

39 the Cañon City and San Juan Railway Company?

Ans. The position of director.

Ques. How long have you been one of the directors?

Ans. Since May, '77.

Ques. What position in the directory did you hold last year before the election of April 10th, last?

Ans. I was president of the company.

Ques. What, if anything, had you to do with originally incorporating the company?

Objected to and question waived.

FOLIO

Ques. I believe you said you were president the year before the last election?

Ans. Yes, sir.

40 Ques. You may state what agency and interest, if any, the Atchison, Topeka and Santa Fé Railway Company had originally in the organization of your company?

Ans. I am not aware that they, as a company, had any.

Ques. In the organization of your company, what company, if any, except your own, was expected to build the road up through the Cañon, if any were built?

Objected to and objection sustained.

Ques. When you organized your company,
41 and since the organization of the company, has your company, as a company, from its own resources and means, expected to build a railroad through that Cañon?

Ans. Well, I think it has.

Ques. That was the purpose for which you organized in the first place to build a road through that Cañon?

Objected to. The object is shown by the certificate of incorporation.

Ans. Yes, sir.

Ques. Is your company building a road through there now?

Ans. So far as I know, it is, through its officers.

Ques. Where do you get the means to build with?

Ans. From the stockholders of the company,
42 so far as I know, and it is paid through its appointed officers.

Ques. Then you mean to say that the expenses of constructing the road through the Grand

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Cañon and up the Arkansas River are drawn from the company itself, from its own resources?

Ans. So far as I know.

Ques You know then of no arrangement or agreement made by the company, your company, with any other person or company for the money to pay the expenses of the construction of this road.

Ans. I do not.

Ques. What is, at this time, the amount of money owned by your Company?

43 Objected to as immaterial. Objection sustained.

Ques. Since you have been director in that road, since the organization of your Company, have you ever known of the Company having a hundred dollars in money in the treasury?

Objected to, and objection sustained.

Ques. From what source does your Company derive means to pay for the construction of this road?

Ans. So far as I know, from parties who subscribed to the stock, Eastern capitalists.

Ques. Can you state who they are?

44 Objected to, and objection sustained.

Ques. Who pays the men at work and who paid those who had been at work heretofore upon the construction of this road?

Objected to as immaterial. Objection overruled.

Ans. The checks that have passed through our business house have been signed by A. A. Robinson, Chief Engineer of the Cañon City and San Juan Railroad.

Ques. Now, I will ask you if you know where

the funds he pays with, or draws on, come from?

Ans. Certainly, I do not.

Ques. When was the construction of this road
45 you call the Cañon City and San Juan Railroad commenced?

Ans. On the 19th of April. You mean construction, not survey nor preliminary work. The actual work was commenced on the 19th of April.

Ques. Who put those men to work on the 19th of April?

Ans. Well, Mr. Clelland gave orders to our clerks. I was absent for a few minutes at the time when the order came in to supply such
46 men as Mr. Morley might have with him and others who Mr. Clelland hired in the street, which we, at the time, charged to James Morley.

Ques. Who was Morley?

Ans. A man who had been previously in the employ of the Cañon City Company. In whose employ he had been, preceding the 19th of April, I don't know.

Ques. Who had charge of those men on the 19th of April, and set them to work, as engineer? Defendants' Counsel: We will admit that Morley did.

Ques. When had you seen Mr. Morley in Cañon, prior to the 19th of April. Objected to.

Ans. Well, I don't remember when I had seen
47 him before I saw him that day, it might have been months before.

Ques. Do you know where he came from that day?

Ans. I do not.

Ques. From whom did you get your first inti-

mation or information on the 19th of April, that your company was going to start, to begin the construction of its road? Objected to as immaterial. Objection overruled.

Ans. Mr. Clelland was the first man spoke to me in regard to it, the treasurer of the road.

Ques. Was Mr. Morely with him at the time?

48 Ans. No, sir.

Ques. Just come into town, had he not?

Ans. I don't know, I don't think that I saw him then. I saw Mr. Clelland before I saw Mr. Morley, they were not together.

Ques. Did you go with Morley that day anywhere?

Ans. I did not.

Ques. You may state from whence the large proportion of the men at work in that Cañon between the 19th and 25th of April came?

Ans. The teams were almost entirely Cañon teams, and such loose men as were about Cañon were all employed, every man that could be hired

49 was employed, got all such help as we could from the neighborhood, every man, I even spared clerks from my store to go to work, and they did work for days, the teams were Cañon teams.

Ques. I ask you from whence the majority of the men came who were at work in that Cañon between the 19th and 25th of April?

Ans. I should suppose the majority came from Puebloward, I don't know where from beyond that.

Ques. Under whose direction were they hired and brought up?

50 Ans. They were under the control of Mr. Robinson, our chief Engineer, I don't know

where he got them, they came into Cañon under his direction, were received by him.

Ques. Mr. Robinson was your chief engineer from and after the 19th of April, was he?

Ans. Yes, sir.

Ques. But never before was he?

Ans. No, sir. He was elected on that day.

Ques. What position did Morley hold in the company before the 19th day of April?

Ans. Well, he had been on the survey, I think, in a subordinate position, as engineer.

Ques. Hired by whom; Holbrook, or the Company?

51 Ans. Well, I can't tell you, I don't know what the arrangement was.

Ques. I will ask you directly if the first information which you, or any of your Company had that the construction of this road, which you call the Cañon City and San Juan Railroad, was to be begun on the 19th day of April, did not come directly from Morley, who came up from the employment of the Atchison and Topeka Railway Company. (Objected to. Objection overruled.)

52 Ans. Mr. Morley didn't speak to me about it at any time. I got my whole information from Mr. Clelland, that we would commence work that day.

Ques. How long before the 19th day of April last did you as one of the directors of the company know that the work on that road was to be begun on that day, or in any fixed time? Objected to as immaterial. Objection overruled.

Ans. I don't think the time, so far as my knowledge is, had been fixed, it was expected to

53 be begun very soon. I don't think it had been

fixed definitely, it had not so far as my knowledge was concerned.

Ques. What company was expected to begin very soon the construction of that road, your company or the Atchison, Topeka and Santa Fé Company?

Ans. Our own company through its own officers as it has done it.

Ques. Do you know whose teams they were, if any, that those railroad hands, the majority of them, were transported to Cañon in and by? Objected to as immaterial. Objection sustained.

54 Ques. What agency direct or indirect did your company have in bringing the men from a distance and putting them at work in the Grand Cañon on your railroad?

Ans. Mr. Robinson, so far as I knew in regard to bringing these men in there, had employed all the teams he could get in Cañon, and some of them were transient Pueblo teams. I don't know of any company teams at all.

Question repeated.

Ans. Well, my answer must be as heretofore, that Robinson hired all the agencies in the way of horseflesh to bring the men in.

Ques. Mr. Robinson was not your agent or
55 Chief Engineer before the 19th, was he?

Ans. Not before the 19th.

Ques. How many men came up there the night of the 19th and morning of the 20th from abroad?

Ans. I have not an idea, there was a crowd, there was a great many.

Ques. You know there was a good many? Mr. Robinson hired them, didn't he?

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Ans. I don't know, sir. I don't know whether through Robinson agency or not. I suppose it was his agency, but I don't know of my own knowledge.

56 Ques. How many men did Clelland succeed in getting to work in the Grand Cañon on the 19th of April, or anywhere on your road?

Ans. I cannot give it definitely. I could not swear to the definite amount. Three or four loads went up, from six to ten in a load that I saw. Whether others went, I do not know.

Ques. Did you see those hand-bills stuck up around Cañon City, advertising for men to work on this railroad?

Ans. I think I did since it was called up here,

57 I had forgotten anything of the kind.

Ques. If Mr. Robinson was Chief Engineer of your road then, and your company was building that road at that time, and the Atchison, Topeka Company were not, how do you account for that hand-bill. Objected to, and objection sustained.

Ques. You saw that hand-bill?

Ans. I think I did.

Ques. Did you or any of your company object to the language of that hand-bill at that time? Objected to, and objection sustained.

Ques. When did you hold your last meeting of the board of directors of your company?

58 Ans. I think the last meeting, I am not certain whether it was the last meeting, for I had been absent a portion of the time, I think that the last meeting I attended was on the 19th of April, but I would not say that was the last meeting of the company, because I have been in St. Louis and away from home a portion of the time.

Ques. What control or supervision, if any, has your company over the construction of that road in the cañon so far as you know?

Ans. I think it has full control through its
59 officers.

Ques. How many and what reports have been made by the Chief Engineer or the Superintendent of Construction to your company since the commencement of work on that road? Objected to. Objection overruled.

Ans. I can't tell you, I don't know.

Ques. What has been the cost or the approximate cost of your work up to this time?

Ans. My other answer would cover that, if there had been no reports. I would have no judgment in the matter, I have not looked it over. I don't know.

60 Ques. What arrangement, if any, has your company made with the Atchison and Topeka Railway Company for the furnishing of money to your company to construct that road with?

Ans. None that I know of whatever.

Ques. Then, so far as you know, there has been no arrangement made between your Company and the Atchison and Topeka Company by which the Atchison and Topeka Company would furnish your Company money to be paid for such
61 money by traffic arrangements and railroad connections with your road?

Ans. Nothing.

Ques. When this road is constructed and completed, if at all, it belongs to your Company, does it? Objected to as leading. Objection sustained.

Ques. What was the greatest number of men, at any time, engaged in the work of construction

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of the road you call the Cañon City and San Juan Railroad?

Ans. That would be impossible for me to tell; a crowd of both companies, so many of both there, difficult to tell D. & R. G. Company; I only met them in town, going out to the road,
62 having business of my own to attend to just then. I have no idea of the force in either camp.

Ques. With whose funds have the expenses of the constructing of the road so far been paid? Objected to. Objection sustained.

Ques. Were you present at the meeting on the 10th of April when the directors were elected last—Mr. William P. Strong was elected at that time a director?

Ans. He was.

Ques. What position, if any, at that time did
03 he hold in the Atchison, Topeka and Santa Fé Road? Objected to as immaterial. Objection overruled.

Ans. I only know by rumor that he was connected with the Atchison and Topeka Road. I know nothing of it by my personal knowledge.

Ques. At the time that your survey was made through the Grand Cañon did you, as one of the directors, know that the D. and R. G. Company had run a line through that cañon and had done some work in the cañon?

Ans. I did not.

Ques. Did you know that they had run a line through there?

Ans. I did not.

Ques. Did you, after the survey was made
64 and the report of your engineer made to your company?

Ans. I never knew until very recently that

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the D. and R. G had ever passed through the cañon, or had any claim on it, until this suit commenced.

Ques. As one of the directors of this company you, at no time until the commencement of this suit, were aware that the D and R. G. Company claimed a right of way in that cañon?

Ans. I was not.

FREDERICK A. RAYNOLDS, SWORN.

Ques. Where do you reside?

Ans. At Cañon City, Fremont County.

Ques. What position, if any, do you hold in the Cañon City & San Juan Railway Company?

65 Ans. I am president of the company.

Ques. How long have you been president?

Ans. About a year, now.

Ques. During your presidency, or your connection with the company as an officer at any time, what do you know, if anything, about any contract or arrangement having been made with any individual or company for the furnishing of money for the construction of your railway from Cañon City through the Big Cañon of the Arkansas?

Ans. There was no arrangement made with any one.

66 Ques. How many shares of stock do you own?

Ans. One share.

Ques. How much did you pay for that, if anything?

Ans. I paid one hundred dollars for it.

Ques. In money?

Ans. The same as money to me. I had a transaction with Mr Rockafellow; we had a trade on that building in our settlement.

Ques. Mr. Rockafellow sold you that share of

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stock as his private property, did he, or as secretary of the company?

Ans. It was private property, I presume.

Ques. Has the company ever had a survey made of that cañon?

Ans. Yes, sir.

Ques. When was that made?

67 Ans. About February or March, 1877, they started in up there.

Ques. Who was your engineer?

Ans. Mr. Holbrook.

Ques. Can you now remember the cost or approximate it of the expenses of that survey? Objected to as immaterial. Objection overruled.

Ans. Well, that survey and the survey west, over Poncha Pass and Comanche Pass, altogether cost to exceed twelve thousand dollars.

Ques. Who paid for that, your company?

Ans. Yes, sir.

Ques. How did they pay for it?

Ans. They paid for it in money.

Ques. To whom did they make the payment?

Ans. To Mr. Holbrook principally. He disbursed it.

68 Ques. From whom, if any person, did the company get the money, the twelve thousand dollars? Objected to as immaterial. Objection sustained.

Ques. How much stock of your company, if any, was issued to pay for the costs of this survey?

Ans. The amount required, twelve thousand dollars, I presume, about that amount.

Ques. Was that stock issued at its par value? Objected to.

69 Ques. At what price on the dollar was this twelve thousand dollars of stock issued? Objected to, and objection sustained.

Ques. How many shares of stock did it take to pay twelve thousand dollars for the survey? Objected to.

Ans. I could not say.

Ques. You don't know how many shares it took to make twelve thousand dollars?

Ans. No, I wasn't president at that time. If I was, I could tell by signing the stock; that was before I came in as president. I was director at that time and paid very little attention to it.

Ques. Do you know how much of your stock
70 still remains undisposed of? Objected that there is no allegation in regard to the amount of stock in the bill. Objection sustained.

Ques. What has been the cost of the construction of this road, up to this time, since the 19th of April?

Ans. Well, I should think in the neighborhood of eighty thousand dollars; eighty or ninety thousand dollars.

Ques. Who has paid that money out?

Ans. The Cañon City and San Juan Railroad Company.

Ques. Through whom?

70 Ans. Well, they issued time checks, or vouchers were drawn on—as I was doing a banking business there I presume made payable by me—drawn on me as president.

Ques. Where did you get funds by which you paid them?

Ans. From Mr. Robinson. The funds came up there in currency, addressed to him.

Ques. Do you know from what source he got it?

Ans. I do not; he turned the currency over to me; I paid it.

Ques. Is the Cañon City & San Juan company

FOLIO

furnishing the money, directly or indirectly, which
71 goes to pay for the construction of this road?

Will you please explain now, where they got the money from and how they get it? (Objected to. Objection overruled.)

Ans. Well, I don't know exactly, where they get it from. I never investigated that very thoroughly. It was no concern of mine.

Ques. How many directors have you?

Ans. We have seven or nine, I ain't certain which—I think it is seven, (seven or nine). I think I can name them.

72 Ques. Mr. Robinson furnished you with the money you paid out, you don't know where he gets it from?

Ans. No, I never investigated that.

Ques. When did you begin the construction of this road?

Ans. I think in February or May, '77; we have been working off and on.

Ques. You say that the money came to Cañon to Mr. Robinson, came up from where?

Ans. I could not say as to that, I presume from Pueblo, though it may have come from further east. It came up there dead head express, I don't remember where it came from. If he wasn't there he gave me an order to get it, to
73 go to the express office and get it. It was simply addressed to A. A. Robinson, as currency.

Ques. Were you present at the meeting at which directors were elected in April last?

Ans. Yes sir.

Ques. What preparation or corporate action was then taken, if any, for the commencement of the construction of this Cañon City and San Juan Road?

Ans. We had our annual meeting at that time. The stockholders elected directors. Directors elected officers. After that there was some talk about going ahead. Mr. Thatcher was
74 there, he is a director. He informed us they were going to commence very shortly.

Ques. Will you tell us who they were?

Ans. Well, the Company. He represented the stockholders.

Ques. Which company do you mean?

Ans. The Cañon City & San Juan. He represented the bulk of the stockholders.

Ques. Do you know who the bulk of the stockholders he represented were or are? Objected to, and objection sustained.

Ques. How long before the 19th of April did you know certainly that your company was going to engage in the construction of that road?

Ans. Well, I was pretty well convinced of it
75 from what conversation I had with Mr. Thatcher about the 10th. I had had a private conversation with him that convinced me they were going ahead to build.

Ques. That your company was?

Ans. Yes, sir.

Ques. You were president and he was simply a director?

Ans. Yes, sir.

Ques. Do you know how much stock he represented in representing these stockholders?

Ans. In the neighborhood of sixty or seventy thousand dollars.

Ques. Did you know William R. Morley?

Ans. Yes, sir.

Ques. When did you first see him?

76 Ans. He was there at Cañon last summer,

about a year ago on his road west then with Mr. Holbrook.

Ques. When did you next see him after that and before the 19th of April, if at all?

Ans. I don't think I saw him.

Ques. You state from whom you got your information on the 19th of April, that your company was then going to begin the construction of the road on that day?

Ans. I was at Pueblo that day and met Mr. Thatcher there and talked with him about it. I went down that morning on the train and got the

77 word in Pueblo, that they were going to commence immediately. I was pretty well aware as I said before, about the 10th.

Ques. Where did most of the men who have worked for the Cañon City and San Juan Company come from?

Ans. I think Mr. Thatcher hired them in Pueblo. He had some posters up there to which he signed my name. He asked me if it was all right to sign my name to posters, I told him all right.

Ques. For whom were the majority who afterwards went into that cañon to work for the Cañon City and San Juan Company employed im-

78 mediately before they went to work for the Cañon City Company? Objected to.

Ans. I think they were tramps mostly, picked them up, that is my idea.

Ques. What connection, if any, had Thomas Nickerson, the president of the Atchison, Topeka and Santa Fé Company with your company?

Ans. None whatever.

Ques. What right, if any, so far as you know,

79 had he to make an arrangement, with the D. and

R. G. Railway Company as to the construction of your route through the Cañon?

Ans. He had no right.

Ques. When did Mr. Robinson become connected with your company as engineer?

Ans. He was elected the evening of the 19th of April He was elected chief engineer, and Mr. Strong, general manager of our road.

Ques. What position does Mr. Strong hold in the Atchison and Topeka road?

Ans. I understand he holds the position of Vice-President of the Atchison and Topeka road.

80 Ques. Who has paid the expenses of this litigation up to this time, your company or some other?

Ans. Our company, I presume.

Ques. Through whom have they paid it. Objected to. Objection sustained.

Ques. You say Mr. Thatcher put out a handbill and signed your name to it on the 19th of April at Pueblo, calling for men to work on this road?

Ans. Yes, sir, Cañon City and San Juan Railroad.

Ques. What authority had been given to him by the board of directors of your company. Objected to. Objection overruled.

81 Ans. I presume no authority, that was his idea in asking me, I presume. He just wanted to know whether it would be right. I told him, certainly, I did not see any objections to that. We wanted men. I knew they had engaged all they could in Cañon at that time.

Ques. Under whose control did the first shipment of men come up?

Ans. I think under his control.

FOLIO

Ques. When did Robinson come up?

Ans. He came up the evening of the 19th.

Ques. What time in the evening was he appointed the Chief Engineer of your road?

82 Ans. About eight o'clock.

Ques. What charge and control was he taking of the men in the cañon, in placing them, before he was appointed, if you know?

Ans. I don't think took any part at all, in fact, I know he did not.

Ques. You know that he did not go up to that place about five o'clock and take his men with him, and place them in the cañon?

Ans. No, I am not aware that he did. We came in on the train together, and we had a conversation and appointed a meeting, went about

83 our supper, and I don't know where he went.

Ques. What connection had Morley with your company at any time?

Ans. I suppose you could call him Assistant Engineer under Holbrook.

Ques. You had no contract with Morley?

Ans. No, sir. We made our contract with Mr. Holbrook.

Ques. What arrangement has your company made with the Atchison and Topeka Company, if any, by which the Atchison and Topeka Company is to furnish the money to your company for the expenses of the construction of this road, and by which arrangement the Atchison and Topeka

84 Company are to receive payment by a traffic arrangement and connection of their road with yours. Objected to.

Ans. There has been no such arrangement that I know anything about, and I have attended

all the meetings, and I am pretty certain that there has been no such arrangement made.

Ques. What control does your company exercise over the construction of that road as it has heretofore proceeded and is now proceeding. Objected to. Objection overruled.

85 Ans. I think we have full control.

Ques. I will ask you if you have ever yet as a company exercised any?

Ans. Well, no. We have a good deal of faith in Mr. Robinson, and are willing to let him go ahead.

Ques. What contracts, if any, have your company made with contractors for building that road?

Ans. I believe our Chief Engineer has advertised for bids and received them.

Ques. I asked you what *contracts* have you made, if any?

Ans. I suppose the General Manager and Chief Engineer would make those contracts. I don't know that they would bring it before us.

Ques. Has the Chief Engineer ever consulted
86 with the Board of Directors in regard to those contracts, or laid them before the Board?

Ans. No.

Ques. Has the Board ever taken any action as to any bids which have been sent in?

Ans. Not as yet.

Ques. Have bids been sent in up to this time?

Ans. I think they have.

Ques. Do you know the name of any of those who have made bids?

Ans. I do not.

Ques. The Board then has taken no action

in relation to this matter at all, but left it with the Chief Engineer?

Ans. And the General Manager.

Ques. Mr. Strong?

Ans. Yes, sir.

B. F. ROCKAFELLOW, SWORN.

Ques. Where do you reside?

Ans. Cañon City.

Ques. What position do you hold in the Cañon City and San Juan Railway Company?

87 Ans. Secretary.

Ques. How long have you held that position?

Ans. Since the organization of the company, our first meeting after the articles of incorporation were filed.

Ques. I will ask you to state what contract, if any, has ever been made by your company with the Atchison, Topeka Company by which the Atchison and Topeka Company is to furnish your company money necessary to construct your road from Cañon City to—I don't know where, at all events to construct your road, and for which the Atchison, Topeka and Santa Fé Company is to be

88 paid by traffic arrangements and connections with your road, or in any other way?

Ans. There is no contract made with the Atchison, Topeka Company as a company to furnish us money.

Ques. I will ask you from what source you raise the money by which you are constructing the road, if you are constructing it. Objected to. Objection overruled

Ans. From the subscriptions to the capital stock of the company.

Ques. Will you state as secretary, how much

the capital stock of the company is at this time?

Ans. One hundred thousand dollars.

Ques. How much of that stock is out?

89 Ans. It is all subscribed for.

Ques. It has been issued?

Ans. It is considered to be all paid for and expended, but the vouchers have not all been entered up.

Ques. How much money has the company realized from the sale of its stock?

Ans. It has been credited for the full amount, that is, will be, when the—— I can't tell the exact amount at the present date, the matter has been in the hands of the general manager and superintendent since April 19th

Ques. Can you tell from consulting books?

Ans. I can tell what amount is entered up to the time the general manager was appointed.

90 Ques. I want to know how much money in dollars and cents the company has ever realized up to this time from the sale of its stock. I don't care if you don't come within a thousand dollars of it, two thousand?

Ans. The amount of the credit on the stock up to the present time, that has been entered, I understand to be between twenty-five and twenty-six thousand dollars.

Ques. In money.

Ans. It is considered to be in money to the company.

Ques. Has the company ever issued any bonds?

Ans. No, sir.

Ques. They have realized about twenty-five or twenty-six thousand dollars from the sale of their stock?

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91 Ans. I say there is that amount entered up on their books; the balance has been expended, but not entered up, as I understand.

Ques. Tell me how much money has been expended by the company on its stock?

Ans. I understand nearly the full amount expended, if not all.

Ques. How much money has been expended to pay for surveys?

Ans. Twenty-four thousand dollars, the entire surveys west. There was twenty-four thousand of the one hundred dollars shares of stock issued in payment of all the surveys that have been made.

Ques. For what other service was any other portion of the stock issued beside the survey?

9[illegible] Ans. For room rent, lights and salaries of officers.

Ques. What officers?

Ans. Treasurer and Secretary, and for legal services.

Ques. How much stock do you hold as Secretary?

Ans. One share.

Ques. How much does the Treasurer hold?

Ans. One share.

Ques. How much has been issued to the attorneys?

Ans. Well, three shares to Mr. Gast as attorney. He holds three shares as attorney; he holds three other shares by subscription subsequently.

Ques. Now, by the subscription subsequently, how much money was realized?

Ans. We understand that all the money has

been realized and expended, but, as I said before, all the vouchers have not been entered up.

93 Ques. How much money, actual dollars and cents, has ever been received by your company for the sale of your stock?

Ans. As I said before, the cash has actually been expended for work in the Grand Cañon, but the vouchers not entered up, all except what was paid for se—— by the directors under our laws.

Ques. Who owns this stock?

Ans. Mr. Isaac T. Burr holds two hundred and eight shares; Aldon Speers, 208 shares; W. B. O. Peabody, 209 shares. I can tell you the larger amounts: Mr. Gast 87 shares, or 90; Mr.

94 M. D. Thatcher, 90 shares; William B. Strong, 90 shares; A. A. Robinson, three shares; Thomas Nickerson, 90 shares, and several smaller shares.

Ques. And is it from the sale of those shares you are raising the money that is building this road?

Ans. It is payment on those subscriptions to the shares of stock that is building the road.

Ques. You expended about twenty-four thousand dollars in stock for the survey?

Ans. Twenty-four thousand, one hundred dollars stock was expended for the entire surveys, including the surveys west that we considered in the interest of our company.

95 Ques. And had about seventy-six thousand dollars left in stock, and it is from the proceeds of this stock you are building this road through the cañon?

The Court: You say there are a thousand shares in the company?

Ans. There are 625 shares subscribed for before the later amounts.

Ques. The proceeds then of 76,000 dollars—shares—or say 760 shares, the proceeds of those seven hundred and sixty shares, are the only means the company has to build this road on, ain't it?

Ans. So far as yet raised, that and what has been paid for incidentals.

Ques. Who is controling the construction of this road in the cañon?

96 Ans. The share holders, through the General Manager and Chief Engineer, directly control it.

Ques. Have any contracts been let yet?

Ans. I understand from the chief engineer that contracts have been advertised and bids received, and contracts let, or about to be let.

Ques. You have never seen them, as secretary?

Ans. They were entirely in his control—until some annual meeting they are entirely in his control as chief engineer.

Ques. Is there anything in your resolutions appointing Robinson giving him this unlimited power, or the unlimited power you speak of giving to the general manager?

97 Ans. He was also appointed general superintendent—superintendent of construction—William B. Strong.

Ques. You have resolutions to that effect?

Ans. Yes, sir, on our records. He is manager of construction, general manager and superintendent of construction.

Ques. Have you as yet seen any propositions which have been advertised, or any proposals advertised, except what you saw in the paper, or have they ever been laid before you as a board?

Ans. We have had no board meetings since that.

Ques. Everything is left to the general manager, Mr. Strong?

Ans. And the chief engineer.

98 Ques. You assisted in the organization of the company, did you not, originally?

Ans. I did.

Ques. Did you at that time, as one of the officers of the company, expect that this company, the Cañon City & San Juan company, would build that road, or did you expect and intend, in forming this organization, to hold that cañon for the Atchison-Topeka company?

Ans. We expected to get the road built through our organization--that was the object in organizing it—was to get another railroad.

Ques. You mean that you expected to let some
99 other company use your name and build this road? Objected to.

Ans. Expected to do just as I answered.

Ques. What was your expectation, or what was the expectation of the Cañon City & San Juan company, at the time of the organization, and up to the 19th day of April last, as to the Atchison-Topeka company building its road through that cañon and holding it, and owning it as its own road? Objected to. Overruled.

Ans. We had no expectation that the Atchison-Topeka company was going to build the road at all. We expected to raise money and have the road built through this organization—the Cañon City & San Juan Railroad—money raised from its stockholders.

100 Ques. Since the 19th of April last, and up to this time, is it not true that the movements and

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operations of your company have been controlled entirely by Mr. Nickerson, the president of the Atchison-Topeka company?

Ans. I can only answer that by telling that the shareholders of the Company are east, and we consider that directly through their influence the operations of the Company have been conducted, that is through their influence seconded by the appointments we have made of superintendent of construction and chief engineer.

101 Ques. What do you know at this time of the Atchison Topeka Company, as a Company raising money for the building of this road through the Grand Cañon?

Ans. If they are raising it, it is credited on the subscriptions to the stock of our Company, and we know nothing directly of their action; we only know that our shareholders are furnishing the money. Handed paper "B."

Ques. Do you know anything about that circular?

Ans. That is the first time I ever saw it, sir.

Ques. Mr. Peabody figures in that? No answer.

Ques. Have you any knowledge of the Atchi-
102 son, Topeka and Santa Fe Railway Company, or the Pueblo and Arkansas Valley Company raising money at this time to build a road through this cañon as its road?

Ans. Only by rumors; no sir, no knowledge of it, except that there is a Pueblo and Arkansas Valley road, and Atchison, Topeka and Santa Fe road, that are raising money.

Ques. Now I will ask you what arrangements if any, you have with these men, Peabody, Speer and the others who you have mentioned as hold-

ing large quantities of this stock for raising and paying more money in the construction of this railroad than their stock amounts to? Objected to. Objection overruled.

103 Ans. We have no arrangement closed.

Ques. What mortgage, if any, have you executed upon your road to secure the persons who advance this money?

Ans. Not any. The road has been built so far entirely on subscriptions to stock.

Ques. Do you know what the cost of it has been up to this time?

Ans. I understand nearly the amount of the capital stock has been expended, and vouchers have been issued up this time. I had it from the chief engineer who was managing it.

Ques. Is the work still progressing in the Cañon?

104 Ans. Some work being done there.

Ques. Have you any idea at this time about what the expenses amount to a day?

Ans. I have not.

Ques. And still you have no arrangement for any more money?

Ans. No arrangement closed.

Ques. Have you any in progress?

Ans. We have an anticipation of an arrangement with the Pueblo and Arkansas Valley Railroad?

Ques. They are to get the money as provided in this circular?

Ans. I don't know where they are to get the money.

Ques. Do you know at this time the Company has raised the money to go on and build the road?

FOLIO

105 Ans. I am told they have I am told by Col. Strong that the money is raised to build clear through.

JAMES CLELLAND, SWORN.

Ques. Where do you live?

Ans. In Cañon City.

Ques. What position do you hold in the Cañon City and San Juan Railway Company?

Ans Treasurer.

Ques How long have you held that position?

Ans. Since the organization of the company, in fact, since the first meeting after the articles of incorporation were filed.

Ques. What is your company now doing towards building a road through the Grand Cañon?

Ans. We are still building every day.

Ques. When did you begin?

Ans. We commenced in the first place the

106 surveys in February, 1877; commenced to construct the road on the 19th day of April, I believe.

Ques. About what time in the day did you begin?

Ans. About ten o'clock.

Ques When did you get the first information that your company was ready to build a road?

Ans. On the tenth of April there was a conversation regarding it, but no definite day fixed at that time when we would commence.

Ques. When did you first get information on the 19th that you were to commence on the 19th?

Ans. About eight o'clock in the morning.

Ques. From whom?

107 Ans. Mr. Morley was my informant at that time that we wanted to commence that day.

Ques. What connection did Mr Morley have

FOLIO

at that time with the company, and what position did he hold?

Ans. He had been employed as engineer of the company previous to that, he had been employed by the Cañon City and San Juan Railway company.

Ques. When.

Ans. I don't recollect exactly as to the time.

Ques. Was he employed at a corporate meeting?

Ans. He was employed under Holbrook, I should think.

Ques. You mean Holbrook employed him, not the company?

108 Ans. Mr. Holbrook had power to employ what employes he wanted.

Ques. Had you had any sort of connection or business relations with him for a year preceeding the 19th of April; had you seen him?

Ans. I hadn't seen him for at least six months previous to that day.

Ques. At that time was he in any employment in the Cañon City and San Juan Railway Company?

Ans. I don't know that he was

Ques. You got your information from a stranger?

Ans. He brought me the information, yes, sir, not from a stranger though.

Ques. At eight o'clock in the morning?

Ans. Yes, I think it was about that time; it was early.

109 Ques. Now then, do you know where Mr. Morley got his information?

Ans. I think Mr. Thatcher informed him

FOLIO

what to do. He was one of the directors at that time—M. D. Thatcher.

Ques. One director informed a stranger that he was to build a road?

Ans. I don't know exactly what he informed him, I have told you just about the correct way of it.

Ques. Now in whose employment, if you know, was Morley at the time he came to Cañon City on the 19th of April.

Ans. I don't know any further than that, I know he had conversation with Thatcher, at least

110 he informed me so, that is all I know about it.

Ques. Who had charge as engineer of the force you put to work that day, if any one did?

Ans. We had no engineer there unless we called him engineer at that time.

Ques. What had he to do with the company?

Ans. On that day I sent him up to the twelve mile bridge to set a gang of men at work there myself.

Ques. Did the company at that time appoint him to any position in the company?

Ans. No, sir.

Ques. Ain't it the truth that you accepted him as one of the engineers of the Atchison, Topeka & Santa Fé company?

111 Ans. I don't know that I gave it any thought at all as regards the Atchison, Topeka & Santa Fé company.

Ques. What word, if any, did he bring from the Atchison, Topeka & Santa Fé company about taking charge of that cañon?

Ans. He didn't bring me any word.

Ques. What information did he give you as to the desires of the Atchison, Topeka & Santa Fe

company, that you should proceed and take charge of that cañon?

Ans. I don't recollect that he gave me any.

Ques. In what capacity did he pretend to act

112 when he came up there and informed you at eight o'clock? Objected to.

The Court. It is competent to ask what he did; what he pretended to is very indefinite; what he said ———.

Ques. Will you state where Morley said he came from?

Ans. He came from Pueblo, as I understood him, that is last.

Ques. How did he come, on the regular train?

Ans. No, sir; it was a little dangerous to travel on the regular train, they might stop it; he came horseback.

113 Ques. What did he tell you about the place he had ridden from since he had started to come to Cañon?

Ans. I don't think he told me anything—that he rode from any place except Pueblo.

Ques. Didn't tell you about Rock Bridge, Rocky Cañon, or Rocky Ford?

Ans. I don't recollect anything at that time; I did hear afterwards, but not at that time.

Ques. What information, if any did he give you about other parties preparing to take possession of the Cañon at that time? Objected to. Objection sustained.

Ques. How many men did you put to work on that day under the control of Mr. Morley?

114 Ans. I had something over thirty men; between thirty and forty men in the two places between the mouth of the cañon and the twelve mile, as near as I can recollect.

FOLIO

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114 Ans. I had something over thirty men; between thirty and forty men in the two places between the mouth of the cañon and the twelve mile, as near as I can recollect.

Ques. When did the next reinforcement of men come up?

Ans. There was a few came up on Saturday, towards evening.

Ques. What day of the month was that?

Ans. The 20th.

Ques. Did any of them come on the night of the 19th, or the morning of the 20th?

Ans. I am not positive as to that; I don't recol-
115 lect as to that; the main part of them came on Sunday.

Ques. About how many men came up between the 19th and 25th of April?

Ans. Well, sir, I could not tell exactly how many came. We had over four hundred in the Grand Cañon, according to the time list—they were all numbered—there was over four hundred.

Ques Where did the majority of those men come from, around Cañon or some distant point?

Ans. I could not say where they came from—they came in teams. I furnished fresh teams and sent them up Saturday.

116 Ques. Prior to the 19th of April, what arrangements had your company made for the construction of your road?

Ans. The only arrangement that was made prior to the 19th was made on the 10th. Conversation regarding how soon we were to commence operations, and the understanding at that meeting was we would commence very soon.

Ques. On the 10th, when you made these arrangements of which you speak, what amount of funds had you to commence with? Objected to, and objection sustained.

117 Ques. At that time, or at any time since, up to this time, what arrangement, if any, had you, or

have you with any person or company by which you are to raise the means for the construction of that road?

Ans. There are no arrangements except as regards those who have subscribed for the stock. Stock has been subscribed for.

Ques. How many shares of stock do you hold?

Ans. I own one share to-day.

Ques. How much money did you pay for it?

Ans. I did not pay any money for it. I received three shares from the company for my

118 services as treasurer, and other duties which I performed for them.

Ques. How many shares does Mr. Thatcher hold?

Ans. I believe he owns ninety shares, sir (referring to memorandum.)

Ques. How many does Mr. Rockafellow hold?

Ans. One, I believe.

Ques. How many does Raynolds? Objected to. Objection sustained.

Ques. Can you tell how many shares of stock you have had to dispose of upon which to get money?

Ans. I think the stock is all issued at the present time.

119 Ques. How many shares were issued for services already rendered, and to be rendered?

Ans. In the first year of the organization of the company there was twenty-five thousand dollars in all issued in stock—twenty four thousand and some odd for surveys, and the balance for rent of rooms and other labors, stationery, etc. made twenty-five thousand in all.

FOLIO

Ques. How long has all the stock been out?

Ans. It is only a short time since it was first subscribed.

120 Ques. Have you ever made a call upon the stockholders for payments on this stock?

Ans. They always paid without a call—very prompt.

Ques. Do you know what the cost of construction has been up to this time?

Ans. I don't, sir. The bills have never been acted upon.

Ques. Have they ever been presented to the Board?

Ans. They have not had any meeting since that time, so that they could act.

Ques. You don't know what the expenses of the company, from its organization down to this time, have been, including all expenses incident to the company?

Ans. I do not.

121 Ques. What control has your company over this construction?

Ans. The directors have the full control over it up to the present time.

Ques. How much have you exercised up to this time, any? Objected to, and objection sustained.

Ques. When was Mr. Robinson appointed Chief Engineer of your road?

Ans. On the night of the 19th of April, in the evening, I think it was.

Ques. What business had he controlling the hands and placing them in the cañon before he was appointed Engineer of your road, do you

122 know? Objected to.

Ques. What right had he to control your

FOLIO

hands before he was appointed Chief Engineer? Objected to.

The Court. If you ask about rights, it will be excluded; what we want is what was done. We will judge about rights without taking the opinion of any one.

Ques. What time did Mr. Robinson arrive in the cañon?

Ans. I could not say, sir. I was busy, that is the truth about it. I don't recollect about what time he did arrive.

Ques. What did he do in the cañon towards controlling their men before he was elected Chief

123 Engineer?

Ans. I don't know that he did anything.

Ques. Don't you now know that he was in the cañon that afternoon before he was appointed Chief Engineer?

Ans. I don't think he could be there at all, that is my impression.

Ques. Do you know at this time upon what business Mr. Robinson, Chief Engineer of your road and then Chief Engineer of the Atchison, Topeka and Santa Fé Road, had in the cañon?

Ans. I don't know whether I met him; am not certain whether I saw him on the 19th.

124 Ques. Was he present when you appointed him Chief Engineer?

Ans. I am not certain as to that sir.

Ques. You don't know that he was there on that day at all?

Ans. I am not positive as I told you. I was busy, had very little time to dispose of?

Ques. Do you know who hired those four or five hundred men who came up from below in

wagons and went to work on your road, as you call it?

125 Ans. My understanding was that Mr. Thatcher was the principal hand that was hiring in Pueblo.

Ques. Where do you understand Mr. Thatcher did employ them?

Ans. I don't know.

Ques. What, if anything, do you know of those men coming from the work of the Atchison Topeka and Santa Fe Company, from La Junta towards Trinidad?

Ans. I don't know anything about that.

Ques. What, if anything, do you know of a large portion of them coming all the way from Kansas City?

Ans. I don't know anything about that.

Ques. What authority, special or otherwise, or
126 general, did Thatcher have from your board of directors, to hire men at this time, or at any particular time?

Ans. He was one of the directors in the Company, and in the conversation on the 10th, it was pretty well understood that we would commence there very soon, but no definite day.

Ques. Was he then and there empowered to pick up men wherever he could find them, and send them up?

Ans. If the case required it. I expect he was.

Ques. The first intimation that you had on the 19th that your Company was a going to build
127 a railroad, on that day, was from Morley?

Ans. Yes sir.

Ques. A man who had no authority on the road?

Ques. Did you ever see that; handed hand bill?

TESTIMONY FOR PLAINTIFF.

FOLIO

Ans. Yes, I have seen some bills similar to this?

Ques. Well, now, were they put out before or after the 19th of April?

Ans. They were printed to the best of my knowledge after the 19th, sir. And the reason if you want it, these bills were printed: The Den-

128 ver and Rio Grande officials, through their men, circulated there, that our Company was nothing but a bogus concern, and it was going to have an effect upon our employing men, and it was talked over with Mr. Robinson and he agreed to sign it as agent of their Company, so we could get more men to work, a little faster.

Ques. I will ask you in relation to that, if you hadn't four hundred men in the Cañon when this was published?

Ans. No sir, that was published on Saturday.

Ques. Was this intended to have effect at Cañon or below, where was this circulated?

129 Ans. It was circulated in Cañon City.

Ques. What proportion of all men ever at work on your road, were men living in and about Cañon City?

Ans. I could not tell the exact number.

Ques. I ask you about what proportion?

Ans. I should judge between forty and fifty men.

Ques. Out of six or seven hundred men, and it was to hold these Cañon City men that this was done? No answer.

CROSS-EXAMINATION OF JAMES CLELLAND.

Ques. Was Mr. M. D. Thatcher, of Pueblo, present at the meeting on the 10th of April?

Ans. Yes sir.

TESTIMONY FOR PLAINTIFF.

FOLIO

Ques. State what quantity of stock he rep-
130 resented by proxies, if any?

Ans. He represented something like six hundred shares of the stock by the proxies from the owners.

H. R. HOLBROOK, SWORN.

Ques. What position, if any, do you hold in the Cañon City and San Juan Railway Company?

Ans. I have no position now.

Ques. Have you ever had any?

Ans. Yes, sir.

Ques What was that position, when you held one?

Ans. As chief engineer.

Ques What services, if any, did you perform as chief engineer for that company?

Ans. I ran their line through the Grand Cañon.

Ques. Who employed you to do that?

Ans. The Cañon City and San Juan Railway.

131 Ques. What agency, if any, had the Atchison & Topeka Company in that employing you?

Ans. They had no agency.

Ques. To whom did you look for your pay for your work?

Ans. There was a contract made with me by the San Juan Company that I was to make the survey for so much stock.

Ques. How much?

Ans. Ten thousand dollars.

Ques. That is the only remuneration you got for it?

Ans. That was the remuneration—this stock was to be credited on my subscriptions or I could credit it to subscriptions of others.

132 Ques. That was a hundred shares, I believe?

Ans. Ten thousand dollars, yes, sir.

Ques. Now, Mr. Holbrook, you had no other pay but that for that business?

Ans. That was considered my pay; I credited it to the subscriptions of some others and received some money for it.

Ques. For what?

Ans. For crediting the stock.

Ques. You don't hold the stock now, do you? Objected to. Objection sustained.

Ques. I will ask you if you were not in the employment of the Atchison, Topeka and Santa Fé Company at the same time you made this survey?

Ans. No, sir.

133 Ques. Did you ever receive any payment from them for this business from the Atchison-Topeka Company?

Ans. No, sir.

Ques. From any other company?

Ans. No, sir.

Ques. What position at that time did Mr. Morley hold in the company, if any, in the Cañon City and San Juan?

Ans. No position that am aware of.

Ques. Did he assist you in making that survey?

Ans. Through the cañon, no, sir.

Ques. He never had any connection with you as the engineer of the Cañon City and San Juan Co., did he?

134 Ans. He made some surveys west the following summer, but he had no connection with me on the survey through the cañon on the first twenty miles.

Ques. When did you abandon your position

as engineer in the Cañon City and San Juan Company?

Ans. When there was another one elected; I suppose that was when.

Ques. Do you know?

Ans. I don't know; some time in April, I think.

Ques. Before this election, which supplanted you, you were in the employ of some other company, were you not? Objected to, immaterial; sustained.

135 Ques. Were you employed on the 19th day of April by the Atchison, Topeka Company, or the Pueblo and Arkansas Valley Company?

Ans. Well, I have been doing some work for the Pueblo and Arkansas Valley.

Ques. On the 19th of April were you in the cañon?

Ans. Yes, sir.

Ques. Was Mr Robinson there?

Ans. Yes, sir.

Ques. What day did he come up to the Cañon?

Ans. Went up on the train; I don't recollect exactly what time the train arrived. It was afternoon train; some time in the evening.

136 Ques. Did you see him that evening in the Grand Cañon or the mouth of the cañon?

Ans. Yes, sir; near the mouth of the cañon.

Ques. Will you tell what he was doing there?

Ans. We went up together to look at the cañon.

Ques. At that time he was not chief engineer of the Cañon City Company?

Ans. I don't know.

Ques. Do you know on what business he went to Cañon City from Pueblo?

Ans. No, sir, I don't positively.

Ques. He didn't tell you?

Ans. No, sir.

Ques. Did you have any conversation with him as you went up to the cañon that day?

Ans. No, sir, very little, if any; some general conversation.

137 Ques. How many men did you find there at work in the mouth of the cañon the evening of the 19th, when you and Mr. Robinson went up?

Ans. I should think there was about ten men; I didn't count them; there was a gang of men, may have been a dozen, ten or a dozen, I should judge.

Ques. You met Mr. Weitbrec there, did you not?

Ans. Yes, sir.

Ques. Did Robinson and Weitbrec have any conversation about this? Objected to. Objection sustained.

Plaintiff wants to show that Robinson was there
138 exercising control before he was appointed on the 19th. Objected to. Objection sustained.

Ques. I ask you if you knew where the large majority of all the men at work in the Grand Cañon of the Arkansas on what is called the Cañon City and San Juan Railroad were brought from?

Ans. The most, I think came up from below somewhere, I don't know where they came from. Some of them came from Cañon City. They were hired.

Ques. You know where some of those that came from abroad came from?

Ans. No, sir, I do not.

139 Ques. Do you know who brought them there,

FOLIO

what company ordered them to work there, looked after them, set them to work, and controlled them?

Ans. I don't know, my understanding was they were employed by agents of the San Juan Railway Company.

Ques. Do you know who those agents were?

Ans. I don't know certainly who employed them.

Ques. How many men came up on the night of the 19th?

Ans. I don't know.

Ques. Some came, didn't they, in the night?

Ans. I don't know whether there was any of them.

Ques. Who ordered you up to Cañon, if any one, on the 19th?

140 Ans. Mr. Robinson wanted I should go up with him to Cañon City.

Ques. Did he express to you what he wanted?

Ans. No, sir.

Ques. Did he say nothing to you about what was going on there?

Ans. I don't recollect, I think there was something said about it.

Ques. Will you state what he wanted to do up there? Objected to. It has already been shown that was prior to his being connected with our road. Objection overruled.

Ans. I don't think he stated, I don't recollect that he did.

Ques. Have you been engaged since in the

141 construction of that road, in any capacity?

Ans. Yes, sir.

Ques. From whom do you receive your pay?

Ans. Mr. Robinson pays me.

Ques. Can you state now approximately what the expenses from the 19th day of April to this time have been? Objected to as immaterial.

Ques. Did you meet Mr. M. D. Thatcher on the 19th of April in Pueblo before you went up to Cañon City?

Ans. I think I saw him.

Ques. Did you have any conversation with him about any matter?

Ans. No particular conversation. Saw him but a moment.

142 Ques. What orders did you receive from him to go up to Cañon to look after the construction of that work?

Ans. None whatever.

Ques. Where were you engaged, in whose employ were you on the 19th of April? Objected to as immaterial, and objection sustained.

Ques. Whose employment was William R. Morley in on the 18th or 19th of April? Objected to. Objection sustained.

Ques. I will ask you if you knew whose employment Morley was in on the 19th of April, at the time the construction of the Cañon City and San Juan Railroad began?

Ans. I don't know.

143 Ques. Who had charge and control of the men as they came up from below to Cañon, to go into the cañon to work on this road?

Ans. I think Mr. Robinson.

Ques. What do you know, if anything, about Robinson's starting men up there before the 19th, and their reaching there on the night of the 19th?

Ans. I don't know if he had anything to do with it.

CROSS-EXAMINATION OF H. R. HOLBROOK.

Ques. What is your business or profession?

Ans. Civil Engineer.

144 Ques. You say you are Chief Engineer of the Cañon City and San Juan Railway Company?

Ans. Yes.

Ques. That you were such in the early part of '77?

Ans. Yes.

Ques. That you located a line through the Grand Cañon?

Ans. I located it, yes sir.

Ques. State what you did in locating that line?

Ans. I set numbered stakes every fifty feet.

Ques. Throughout its entire length?

Ans. Yes, sir.

Ques. Permanent stakes?

Ans. Yes, sir.

Ques. Such stakes as are usually used in a survey of a line of railroad in locating it?

Ans. Yes, sir.

145 Ques. Who assisted you in doing it?

Ans. There was Mr. Brandegee and Mr. Stimpson, and several other men.

Ques. For how far did you locate a line?

Ans. For about twenty miles above Cañon City.

Ques. Did you plat that located road?

Ans. Yes, sir. Objected to as not cross-examination, and the last question and answer withdrawn.

Ques. You say Mr. Robinson, on the 19th of April last, went in company with you to the mouth of the cañon?

FOLIO

Ans. I think we were at the mouth of the cañon.

146 Ques. What time in the day?

Ans. It was towards night, about sunset, I think.

Ques. Found a force of men employed above there at that time?

Ans. Yes, sir.

Ques. Was Mr. Robinson at that time assuming any control of these men?

Ans. No, sir.

Ques. Giving any orders?

Ans. No, sir.

Court adjourned until 2 o'clock.

JAMES A. McMURTRIE SWORN.

Ques. What position, if any, do you hold in the Denver and Rio Grande Railway Company?

Ans. Chief engineer.

Ques. How long have you held that position?

147 Ans. Since about three years.

Ques. Had you any employment in the Company as early as 1871?

Ans. Yes sir.

Ques. Are you acquainted with the Grand Cañon of the Arkansas?

Ans. Yes sir.

Ques. When, if at all, did you make a survey in that cañon first?

Ans. In January and February, 1871.

Ques. You may state the character of that survey, as to its being a preliminary or final survey?

Ans. It was a close preliminary.

Ques. Explain what that means?

Ans. It is a line run very near location, with the exception that it has no curvature in it.

FOLIO

148 Ques. State where the correction in the line as to curvature, would be made on the ground or at some other place?

Ans. The location of curves could be made in the office and afterwards, and put in the ground from the line already surveyed.

Ques. You may state how nearly that was a completed survey, so far as to make it a location of a line?

Ans. All that would have been required was to put in the curvature.

Ques. State now, as an engineer, whether in locating a line for the construction of a road, it is usually or ever made accurately—the survey ever made accurately, correct, so that there are no

149 changes when you come to construct?

Ans. Very seldom.

Ques. When did you make a survey of that cañon since January, 1871, as you have already spoken of?

Ans. In January, 1872, I continued the survey four miles—between four and five miles, I don't know the exact distance.

Ques. At the time of your survey in '71 and '72, state what you did, if anything, to mark the line of your survey?

Ans. I put stakes in the cañon every hundred feet, and on points where it is necessary put a plus in—what I mean by a plus is a stake be-

150 tween the hundred feet, from Cañon City bridge to McCandless Park, where what is now called the twelve mile bridge, that gulch comes down. There, in '72, I continued the same survey between four and five miles further.

Ques. You havn't answered that part of the

FOLIO

question that referred to what you did to mark that survey?

Ans. I put stakes in.

Ques. What, if any marks, did you put on those stakes?

Ans. I put numbers on the stakes, marking
151 them. The station at Cañon City bridge I believe was 37. They were numbered consecutively right through the cañon.

Ques. How much, if any, of that cañon was left without surveying and staking?

Ans. Not any of it.

Ques. When since 1872, if at all, have you made a survey through that cañon?

Ans. We started a survey on the 19th of April, and ran up the cañon about three miles, I think, and we were stopped by the Court, and after the Court had rendered a decision, we made a survey from there, well, through to South Arkansas—continued it on since that time.

Ques. In whose employment and for what
152 company, if any, did you make the surveys, in 1871 and 1872.

Ans. The Denver and Rio Grande Railway Company.

Ques. To whom did you report that survey?

Ans. To Col. Greenwood.

Ques. What position did he hold in the road—the Company—at that time?

Ans. General manager.

Ques. In making the survey in April, 1878, of which you have already spoken, how many, if any, of the old stakes which you had set in '71 and '72 did you find in the cañon.

Ans. I saw but very few of them at the lower
152 end of the cañon, in the Royal Gorge I saw a

FOLIO

number of them still standing on the rocks above high water mark.

Ques. In going through that cañon in April, 1878, from the mouth of it to the head of it, what other stakes, if any, besides those you had set in 1871 and 1872, did you find in that cañon?

Ans. I found a line of stakes there; I don't know who set them though.

Ques. How many, if any, did you find in what is called the Royal Gorge?

153 Ans. I found none.

Ques. I understand you found more of your old stakes in the Royal Gorge than anywhere else?

Ans. I found no stakes in the Royal Gorge excepting mine.

Ques. How nearly did your survey made in April, 1878, coincide with that made in '71 and '72?

Ans. About on the same ground.

Ques. State if you know what work was done in '71 and '72 by the Denver & Rio Grande company in the cañon of the Arkansas on the line of survey as you made it, and the character of that work?

154 Ans. In February, '71, I set three or four men to work in the upper end of the cañon, and then I came away. Once afterwards when I was back, a year or so after that I went in there to look at that work, and also at this last time we were in there I noticed there was a hundred yards of masonry in there, a retaining wall put up. I should think about between four and five hundred yards of material had been moved and road bed partially graded from three to five hundred feet.

Ques. To what width?

155 Ans. The first hundred feet from the lower end of the cañon, I should think had been graded from

FOLIO

six to seven feet wide, the next hundred feet about eight, the next two hundred run all the way from a foot-and-a-half wide up to four feet.

Ques. How did that work coincide with your survey?

Ans. Well, I set side stakes for that work before I left there and instructed a man by the name of Workheiser that was through there on the survey with me to superintend it.

Ques. Do you recollect at this time the wages paid for that sort of work? Objected to as immaterial. Objection sustained.

Ques. How far above the Royal Gorge was this work done?

Ans. It was right at the upper end of the Royal Gorge.

Ques. How many, if any, stakes set by any other company than your own, did you find on that work, when you went through there this last April or May?

Ans. Found stakes in there every one or two hundred feet, scattered along—didn't take notice of them—but I noticed a line of stakes in there—new stakes.

Ques. When you said this work was done in
157 the Royal Gorge, state what you mean by that, whether in the Royal Gorge, or just above it?

Ans. Just above it.

Ques. When you went in last, in '72, and surveyed on four or five miles up above McCandless' bridge, how far did your orders require you to survey at that time? Objected to, and objection sustained.

Ques. In the year '72 or '73, what other work did you do as an engineer in that cañon of the Arkansas river?

FOLIO

Ans. I made a reconnoissance with Col. Greenwood and Mr. Holbrook from McCandless' Park
158 to I think six miles up Poncho creek—about four to six miles we got up Poncho creek.

Ques. Of the survey you made in '71 and '72 what, if any, plats or notes did you make?

Ans. I made a map and profile of the work done in '71.

Ques. Have you that at this time in your possession as engineer?

Ans. Yes, sir, it is in your office.

Ques. You may state what other survey, if any, would have been necessary in that cañon to construct a line of road through there upon that survey of yours?

Ans. Necessary to run over that line and put in the curvature.

156 Ques. State where that curvature might have been put in?

Ans. Put in where all the angles were turned.

Ques. Would it have been necessary to have gone on the ground?

Ans. It would have to have been done on the ground; stakes would have to be put in before the work could have been done.

Ques. State further, what is the usual practice as to when these new stakes, to show the curvature, are put in, before or after beginning the work of construction?

Ans. Well, it depends altogether how fast they want to construct, sometimes done immediately
160 before construction, sometimes the line is located, without a preliminary being run at all. Some engineers are expert enough to locate a line without running a preliminary.

Ques. Now, you may state whether in going

FOLIO

from Cañon City up the Arkansas River westward, towards the South Arkansas, whether there is any other practicable route except that through the Grand Cañon and up the Arkansas Valley. I don't mean possible route, I mean practicable route?

Ans. No sir. I don't think there is.

Ques. What attempts, if any, have you made
161 as chief engineer of the Denver and Rio Grande Railway Company to find any other practicable route to reach that route?

Ans. I have had several lines run; up Grape Creek and across into Texas Creek, down Texas Creek, and down Oak Creek to the Rio Grande River.

The Court. To the Arkansas, you mean. You didn't run to the Rio Grande?

Ans. Down into the Arkansas, yes, sir.

Ques. Were you at Cañon City on the 19th day of last April?

Ans. Yes, sir.

162 Ques. What time did you arrive at Cañon, if at all?

Ans. I think about ten o'clock; between ten and eleven.

Ques. Did you see Mr. A. A. Robinson, the chief engineer of the Atchison, Topeka and Santa Fé Road, on that day at or near Cañon City?

Ans. Yes, sir.

Ques. Where did you see him that day?

Ans. Near the mouth of the cañon.

Ques. Did you observe what he was doing at that time?

Ans. I don't think he was doing anything, only he was coming down out of the cañon; I met him in company with Mr. Holbrook.

FOLIO

163 Ques. Did you see a man named W. R. Morley that day?

Ans. No, sir.

Ques. Did you know Morley before that day?

Ans. Yes, sir.

Ques. Do you know of his having any employment before that day?

Ans. Yes, sir.

Ques. With whom? Objected to, and objection sustained.

Ques. Do you know in whose employment he was on the 19th day of April, 1878?

Ans. No, sir, I do not know positively.

Ques. Did you see any of the men who from the 19th until the 25th were employed in building a railroad or working on the grade in the

164 Grand Cañon of the Arkansas, not employed by your company, the D. & R. G.?

Ans. Yes, sir.

Ques. Had you ever seen recently before the 19th of April those same men at work for anybody else?

Ans. Yes, sir,

Ques. For whom were they employed? Objected to as immaterial, and objection sustained.

Plaintiff's counsel proposes to show that they were taken off of the Atchison, Topeka and Santa Fé Road, and set to work there by some agents who had been employing them before there was

165 any communication or correspondence between these two companies, the Atchison, Topeka and Santa Fé and the San Juan.

The Court. I don't think that is material.

Ques. Did you have any conversation with Robinson or Holbrook on that day, the 19th of April?

FOLIO

Ans. Nothing more than to pass the time of day with Mr. Robinson and Mr. Holbrook, I think; I am not certain.

Ques. Did you have any conversation at any
166 time between the 19th of April and the first of May, with any of the men, employés, engaged in this cañon, in the construction of a railroad grade, other than the Denver and Rio Grande men?

Ans. Yes, sir, I think I have.

Ques. In any of these conversations what, if anything, was said as to who they were working for? Objected to. Objection sustained.

Ques Did you have any conversation with any one of the officers, engineers or contractors, superintendent or foremen of those men in relation to who they were working for?

167 *The Court.* That should be confined to officers of the company. Declaration of workmen not receivable against the company, except in certain cases.

Ques. I will leave off contractors, confining it to officers of the company, and ask you if you had any conversation with them as to who was building a road in that Cañon?

Ans. No, sir, I don't know that I had.

(Hands witness rolls and books.)

Ques. You may take these and unroll them, and explain what each one is? You say you made the profile and map of the route. Show which is the profile Objected that the fact of their making a profile or not making one, mapping it, or not making the map, has nothing to do with the issues. There is no statement in bill or answer, nothing requiring them to.

Plaintiff's Counsel. It simply goes to show the thoroughness of the survey.

FOLIO

The Court. They have a right to show what they did in the location of the line, whether it be much or little ; they have the right to prove that they made a survey. Then the question is whether the survey is a sufficent location. It is no objection to evidence of a fact when it has
169 been shown it may or may not be sufficient. Proceed, sir.

Ques. Examine that profile, is that the profile you made at the time ?

Ans. Yes, sir. This profile was made from levelings taken at the time.

Ques. When was that made ?

Ans. That was made in January, '71.

Ques. How many miles did that cover ?

Ans. I think it is nine and one-quarter miles.

Ques. What is that large paper there ?

Ans. The map of the line

Ques. When was that map made ?

Ans. In January, 1871

Ques. Explain the difference between a profile and a map ?

Ans. One platting the line, the other is the
170 surface of the ground, a cross-section showing the cuts and fills. The map only shows the alignment. The portion on white paper shows the line of '71, on the brown in '72.

Ques. To whom was that report or map returned ?

Ans. To Col. Greenwood.

Ques. What are those books you have there ?

Ans. Those are the field notes.

Ques. Made at that time also ?

Ans. Yes, sir.

The Court. It is not necessary to make it an exhibit, you can state in the notes generally what

FOLIO

it is, unless there is some controversy as to the
171 particular character of it.

Ques. I understand you to say you run this angle line in this instance, and that the curvatures can be platted in the office without going on the ground?

Ans. The curvature on the map can be platted in.

Ques. How would you use that map when you came to construct the road?

Ans. You would have to take the map or a copy of it to the field and put the stakes in, with an instrument, as marked off on the map.

Ques. I will ask you further, whether it is
172 necessary in any case to do that before the work of construction is begun, or whether it may proceed along with the construction?

Ans. The stakes have got to be put in before there is any work done.

Ques. And you can go right on ahead, and it can be followed by the constructors?

Ans. Yes, sir, if you have got an engineer corps to keep ahead of them, putting the curvature in.

CROSS-EXAMINATION OF MC MURTRIE.

Ques. What date were you made Chief Engineer of the Denver and Rio Grande Road?

Ans. I don't remember the date.

Ques. In what capacity were you employed in '71?

Ans. I was Assistant Engineer, one of the assistants on the road.

173 Ques. What time in the year 1871 was it that you made that survey?

Ans. In January.

FOLIO

Ques. You said in your direct examination, did you not, that it was done in January and February?

Ans. I was there in January and February, the survey was all completed in January.

Ques. For what distance?

Ans. Nine and a-quarter miles.

Ques. Where did the nine and a-quarter miles commence?

Ans. Commenced at the Cañon City bridge.

Ques. How far above Cañon City?

Ans. It is about three quarters of a mile, from the center of town not quite half a mile.

Ques. And extended it up?

174 Ans. To what is now called the 12-mile bridge.

Ques. Commencing at a point half or three quarters of a miles above Cañon City, and reaching nine miles and a-quarter up the Arkansas?

Ans. Yes, sir.

Ques. How far would that take it above what is known as the Royal Gorge?

Ans. Three and two-tenths miles above the upper end of the Royal Gorge.

Ques. You only put in angle stakes?

Ans. Yes, sir.

Ques. Didn't put in curvature stakes at all?

Ans. No, sir, didn't put in curvatures.

175 Ques. You say that these curves can be put on the map in the office. In a cañon of that kind, with the physical features of that cañon, could you make your curvatures correspond in all instances?

Ans. Yes, it would be very close to your angle line.

Ques. It would require very short angles?

Ans. No, sir.

FOLIO

Ques. You say you could put your curves upon your map, then, in that class of cañon put the curve upon the ground?

Ans. Might not fit exactly when you come to put them in the ground.

Ques. Would there not be places would not fit at all?

Ans. No, sir.

176 Ques. When you speak of putting in curves, you mean to be understood as doing it in open country?

Ans. It is no worse than in an open country, in an open country where there is nothing to bother you, generally run a curved line for a preliminary.

Ques. You didn't run a curved line there?

Ans. No, sir.

Ques. In the location of a railroad, how often are stakes set?

Ans. Every hundred feet.

Ques. Are they not set fifty feet.

Ans. Some places they are, depends altogether upon the engineer. The character of the ground would determine that a good deal. Some put
177 stakes in every fifty feet, some every twenty-five. In that character of ground every hundred feet was close enough.

Ques. Close enough for construction?

Ans. Yes, sir, when they would come to side stake the work, they could put the *pluses* in. The plus is a middle stake between these two.

Ques. I don't understand you as meaning to say that a hundred feet apart was sufficient to commence work?

Ans. No, sir. Sometimes have got to put in

FOLIO

Ques. You said in your direct examination, did you not, that it was done in January and February?

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Ques. Close enough for construction?

Ans. Yes, sir, when they would come to side stake the work, they could put the *pluses* in. The plus is a middle stake between these two.

Ques. I don't understand you as meaning to say that a hundred feet apart was sufficient to commence work?

Ans. No, sir. Sometimes have got to put in

stakes every two or three feet, according to the break of the ground.

Ques. Before you commence work on the ground you have——?

Ans. Not on ground where there is no change
178 in the surface. Through that cañon where the ground is changing continually you would have to put in plus stakes.

Ques. Who did you say you was at work for at that time?

Ans. The Denver and Rio Grande Railway Company.

Ques. Were you at work for the Denver & Rio Grande Railway or the Union Construction Company?

Ans. Well, it is one and the same thing.

Ques. Explain what they were, if there is any difference?

Ans. The Union Contract Company is the contracting company for building the road; just as soon as it is completed, the Denver & Rio Grande take it off their hands.

179 Ques. You were at work at construction; in the construction you were not at work for the Rio Grande company, at all, were you?

Ans. Not directly.

Ques. You were only building a road that would be turned over, when completed?

Ans. Yes.

Ques. Who were you directly at work for?

Ans. Directly under Col. Greenwood.

Ques. For what company or organization were you at work?

Ans. For the Union Contract Company.

Ques. For what company was Col. Greenwood at work?

FOLIO

Ans. For both companies, as I understand it.

Ques. Then do I understand you to say that
180 the Denver & Rio Grande Company had nothing to do until the work of construction was completed, and the property turned over to them?

Ans. The surveys were generally made under the direction of the Denver & Rio Grande Railway Company, but the Union Contract Company paid for them.

Ques. Were they made under the direction of the Denver & Rio Grande Company?

Ans. Yes, sir.

Ques. Or the Union Contract Company?

Ans. I generally received all the orders I received from officers of the Denver & Rio Grande Company, at that time I received them from Col. Greenwood.

Ques. In what capacity—as an officer of the
181 Denver & Rio Grande, or an officer of the Union Contract Company?

Ans. I don't know how that is, as he was working for both companies.

Ques. Will you say that Mr. Greenwood ever worked for the Denver and Rio Grande Company at all?

Ans. Yes, sir.

Ques. In January, 1872 you continued the survey four or five miles?

Ans. Yes, sir.

Ques. That was a year after your first survey?

Ans. Yes, sir.

Ques. But there was never but nine and one-half miles of that platted?

Ans. Yes, the whole, between thirteen and fourteen miles was all platted, the profile was not made of the last four or five miles.

FOLIO

182 Ques. When you speak of plat, you speak of the alignments the surface map, do you not?

Ans. Yes, sir.

Ques. But no profile was ever made, except of nine miles and a quarter?

Ans. No, sir.

Ques. No profile put on file or anything? Was there any made at all?

Ans. I think there was; made in the field. We generally make a profile as we go along, hardly ever retain it, generally take a piece of profile paper and plat it along to see that the grades are not too heavy.

Ques. But you think it was never handed over to any one?

Ans. No, sir.

183 Ques. The profile of a road when made by the engineer is handed to the company usually, is it not?

Ans. To his superior officer, to the chief engineer.

Ques. What is the purpose of the profile? To estimate the probable cost of the road?

Ans. Yes, sir.

Ques. You say no profile of this last four or five miles was ever handed to the chief engineer?

Ans. Not that I know of.

Ques. Consequently no estimate of any cost of construction was ever made of that portion of it?

Ans. No, sir.

Ques. Who were you from January, 1872, until you went back into the employment of the

184 company—when was that, in 1875?

Ans. No, sir; I was in the employment of the company continually. I was recalled from that

FOLIO

suvey to make some surveys around Pueblo, we were building our road to Pueblo about that time.

Ques. And you never went back on to that other work until 1878?

Ans Not to run a line; I made a reconnoissance there from McCandles's Park to the South Arkansas.

Ques. No survey?

Ans. No sir; made no survey.

Ques. Where is McCandles's Park?

Ans. Opposite twelve-mile bridge.

Ques. And you made a reconnoisance from

185 there up. Now, as we are not engineers, tell us what that was?

Ans. Well, it is going over the country, and seeing what the probable cost will be for building a road through there,

Ques. Riding over it, looking at it without an instrument?

Ans. Yes sir; although at that time we took some courses to get the general course of the stream—had a pocket compass.

Ques. No engineering force with you?

Ans. Nobody but Col. Greenwood, Mr. Holbrook and myself.

Ques. All you did at that time was to take some courses with a pocket compass?

Ans. Yes sir; packed our grub on our backs and walked through.

186 Ques. You say in February, 1871, you put some men to work upon that ground up there?

Ans. Yes sir.

Ques. How far had the Denver and Rio Grande completed a line of road at that time, and where from, and where to?

Ans. They had not completed any road, they

were just making their location from here south.

Ques. From Denver south?

Ans. Yes sir.

Ques. Where was the nearest railroad, how far was the nearest finished railroad to the point where you put your men to work?

Ans. River Bend, I think.

Ques. How far was that?

Ans. Some one hundred to one hundred and fifty miles.

Ques. Did you put your men at work up there for the purpose of constructing a railroad?

187 Ans. Well I don't know that they stated what they were put there for. They were put there to do some of that grading at the upper end of the cañon.

Ques. For what purpose?

Ans. For the purpose of securing that line, I suppose.

Ques. For the purpose of securing a line? Was it the intention of your Company to commence at the upper end of the Arkansas and build down?

Ans. I don't know what their intention was.

Ques. Who were these three or four men you put to work there—have you anything to show their names?

188 Ans. No, sir; I don't know who the first three or four were—the last three I put to work.

Ques. Where did you take those men from to put them at work?

Ans. From Cañon City.

Ques. You say that there was some masonry constructed; what do you mean by masonry in engineering?

Ans. Masonry is a wall built out of rock.

FOLIO

Ques. Is it a wet wall or dry wall, or may it be either. Do you commonly call a dry wall masonry?

Ans. Yes, sir; it is a retaining wall—it is masonry—it is a dry wall.

Ques. Ordinary laying up of rock, loose rip-rap work, do you call that masonry?

Ans. Not rip-rap work; no, sir.

189 Ques. What kind of wall was this that was built?

Ans. Well, this was a wall with a straight face, about two-and-a-half feet thick; two feet to two feet-and-a-half thick.

Ques. Laid loose—out of loose material?

Ans. No, sir; it was laid up solid, out of flat rock.

Ques. Dressed?

Ans. It didn't require any dressing—same material they took off the side hill.

Ques. How long did they build that retaining wall, as you call it?

Ans. One wall about sixty feet long, average about fourteen to sixteen feet high; another wall about fifty feet long and about six feet high; and

190 there was two other short walls put in.

Ques, When did you recall your men from there?

Ans. Just quit themselves; I don't know.

Ques. Who superintended them while they were building?

Ans. I don't know that; I think Mr. Workheiser.

Ques. Was he an engineer?

Ans. No, sir; I sidestaked the work, and took him up and showed him where it was.

Ques. How far was that from the Royal Gorge?

FOLIO

Ans. Right at the upper end.

Ques. Which way did it run—run up away from the Royal Gorge?

Ans. Yes, sir.

Ques. How wide was the ground you were at work on there?

Ans. Very little open ground; right on the
191 bench beginning to slope into the mountain; I suppose, a slope of from twenty to thirty degrees, I should think, sloped back four or five hundred feet; raised perpendicularly five or six hundred.

Ques. How wide was the cañon at that place, the bottom?

Ans. Sixty or eighty feet wide; where we did the work was about thirty feet above the river; there was a bench in there.

Ques. Who paid those men?

Ans. I don't know.

Ques. Nor how long they remained there at work?

Ans. No, sir, as I came away from there.

Ques. You say you found a line of stakes on the 19th of April?

Ans. Yes, sir.

Ques. Where did you find them first, at what place?

192 Ans. Found them in the lower end of the cañon first.

Ques. How far did they extend up?

Ans. To the mouth of the Royal Gorge, and from the upper end of the Royal Gorge to McCandless' Bridge; I didn't follow them any further.

Ques. How near were they set together, or how far apart?

Ans. Some places every hundred feet; some

places closer; I didn't notice them particularly.

Ques. You say you don't know who set them, was it the survey of a railroad line?

Ans. All I know who set it is by hearsay, not of my own knowledge.

Ques. How many stakes in all did you find of
193 your original stakes in going up there, through there?

Ans. I didn't count them; I suppose I noticed twenty or thirty of them in the cañon, that is, in the Royal Gorge; I noticed two or three above the Royal Gorge; I could not find but very few of them.

Ques. For what purpose did you go there on the 19th of April?

Ans. To build a railroad.

Ques. Where to?

Ans. To Leadville.

Ques. You didn't go there for the purpose of building a road through Poncho Pass, over into the San Luis Valley? Objected to. Objection overruled.

Ans. No, sir.

Ques. Do you as Chief Engineer of that company, or did you at that time, hear of any inten-
194 tion of building a road up the Grand Cañon of the Arkansas, and through Poncho or Marshall's Pass over into the San Luis valley?

Ans. No, sir; I never had any instructions any further than the South Arkansas.

Ques. As an officer of that company, where was it the intention of your company to build, if you know?

Ans. I don't know.

Ques. You just stated to Leadville,—you were never told so?

FOLIO

Ans. No, sir, they made estimates.

Ques. Were you never consulted in regard to a road the other way, into the San Luis valley?

Ans. No, sir.

Ques. Was there any intention of the Denver
195 and Rio Grande Company, when they entered upon that pass on the 19th of April constructing a road through Poncho or Marshall's Pass into the San Luis valley, and down to connect with your road at Alamosa?

Ans. Not that I know of; don't know anything about the intention of the company. Generally say they want so much road built; that is all they say.

Ques. Was it the intention of the company expressed to you, to build this line of road as a part and parcel of the main trunk line of the Denver and Rio Grande Road? Objected to as immaterial. Objection sustained.

196 Ques. At the point you constructed, or had these two or three men at work to construct the other end of a railroad, was there room for any more track?

Ans. Room on the other side of the river, if they paid enough money for it. It was almost impossible for more than one road to build there.

Ques. You say you have surveyed quite extensively a line up Grape Creek, across into Texas creek, and down the river,—that was since the 19th of April—you can find no practicable route?

Ans. No, sir.

Ques. What do you consider a practicable route?

197 Ans. That depends altogether on the curvatures and the grades they wish to use.

Ques. What do you consider a practicable route for a narrow gauge road?

Ans. Well, one hundred and fifty to two hundred feet grades.

Ques. What curvature?

Ans. Thirty degrees.

Ques. Is it not a fact that two lines can be built in the Grand Cañon with grades not to exceed 175 feet each, or 200 each, and with a curvature of not more than thirty degrees, that distance of not more than a mile and a half through the cañon?

Ans. No, sir; nor with ten.

Ques. There is no such route there?

Ans. No, sir.

Ques. Is there any point in the Grand Cañon
198 or Royal Gorge that there is not ample room for two roads?

Ans. Two roads can be built through there by paying enough money.

Ques. I understood you to say the only purpose of doing that little work that was done up there was for the purpose of holding the right of way in case you wanted to build afterwards.

Ans. I only supposed that; I don't know what the purpose was; my orders were to put men at work.

Ques. Do you not know what the intention of the company was at that time, at all?

Ans. No, sir, I don't know

Ques. Would a company commence at the up-
199 per end, without any connection or transportation, and build a road down?

Ans. Not very likely.

Ques. Do you not know that the only object in doing that small amount of work that was done

FOLIO

was for the purpose of claiming the line in case you wanted to use it thereafter?

Ans. I don't know exactly what purpose—I was ordered to put men at work; I done so.

Ques. Was it, or was it not for the purpose of continuing the construction of a railroad?

Ans. I don't know.

Ques. You don't know whether it was or not?

Ans. No, sir.

RE-EXAMINATION OF McMURTRIE.

Ques. You say it is possible to build two roads
200 through the Grand Cañon, at any point in the cañon; have you ever made an estimate of the difference in expense between the first choice of roads through that cañon and the second choice. You may give it?

Ans. I don't know—have made as close an estimate—I should think a difference of one hundred and fifty to two hundred thousand dollars in the first nine miles through that cañon.

Ques. Have you made an estimate of the cost of construction on the road that you originally
201 surveyed through that cañon?

Ans. Yes sir.

Ques. What is it per mile, at this time? Objected to. Not re-examination. Objection overruled.

Ans. Do you mean what would be the present cost of line, if constructed on?

Ques. Yes sir, on the route you surveyed in 1872?

Ans. I can tell you by referring to my memorandum. Line originally surveyed, present cost at present prices, ten thousand five hundred dollars.

FOLIO

Ques. Per mile? What do you mean by construction, grading?

Ans. Just the grading, yes sir.

Ques. Have you made any estimate upon the other side, second choice?

Ans. No sir, not made an accurate estimate, I have looked over the ground.

202 Ques. You say you made no accurate estimates—you looked it over as an engineer?

Ans. (150 to 200) one hundred and fifty to two hundred the first eight miles in the cañon.

Ques. You were asked about the Union Contract Company—I will ask you to state if the Railroad Company don't make its surveys, and then hire the Contract Company to build the road upon the survey, whether that is your understanding of the way they do business?

Ans. I have always understood that the Rail-
203 way Company made the surveys, and the Contract Company worked upon the surveys.

RE-CROSS-EXAMINATION.

Ques. You say you always understood the railway company made the surveys, and the Contract Company worked upon them?

Ans. Yes, sir.

Ques. State who you understood it from, how you came to understand it so?

Ans. I don't know as I understood it from anybody directly.

Ques. Do you now swear that the Union Contract Company didn't make the surveys in those instances?

Ans. No, I don't know as I would, because I
204 don't know positively what they have.

Ques. When you say it will cost them from one hundred and fifty to two hundred thousand

to build one line more than it would another, having made but one estimate you just get at that by guess, do you not?

Ans. Yes, sir.

Ques. You don't state it as a fact, as an engineer?

Ans. No, only an approximate estimate.

Ques. Have you ever examined it for the express purpose of ascertaining what the difference of cost would be?

Ans. No, sir; only during the time we were in the cañon.

205 Ques. Now, you just judge from your general knowledge of the cañon?

Ans. Yes, sir

JAMES R. DE REMER SWORN.

Ques. What position, if any, do you hold in the D. & R. G. Railway Company?

Ans. Assistant Engineer.

Ques. How long have you occupied that position?

Ans. For several years.

Ques. Have you ever been in the Grand Cañon of the Arkansas?

Ans. I have.

Ques. Were you there on the 19th of April last?

Ans. Yes, sir.

Ques. Did you from the 19th of April to the first of May go through the entire length of that Cañon?

Ans. I went to the head of the Royal Gorge, within three hundred feet of the head of the

206 Gorge.

Ques. Did you on the afternoon of that day,

FOLIO

the 19th of April, meet Mr. A. A. Robinson, chief engineer of the Atchison, Topeka and Santa Fé Railway Company?

Ans. I did.

Ques. Did you have any conversation with him?

Ans. Yes, sir.

Ques. State the substance of that conversation?

Ans. I was coming out of the cañon in the evening, about sundown, met Mr. Robinson and Mr. Holbrook in a buggy. Mr. Robinson asked me what we were doing on their right of way? I asked on whose right of way? He said the Atchison, Topeka & Santa Fé. I said I didn't
207 know they had a right of way in there. He informed me they had made their survey and had their plat filed.

Ques. In going through that cañon at any time between the 19th and 25th of April last, did you find any stakes in the cañon, outside of the gorge?

Ans. Of whose?

Ques. Any stakes at all from the mouth of the cañon up to the mouth of the Royal Gorge?

Ans. Yes, sir.

Ques. Could you tell what stakes they were,
208 or for what they were intended by looking at them and the manner in which they were set?

Ans. There were stakes there for two different surveys, two sets of stakes.

Ques. How could you distingush one set from the other?

Ans. One being much older than the other. Could not tell the mark on one set except on one stake, the others were marked with pencil, lead pencil, black mark.

FOLIO

Ques. How many sets of stakes did you find in the gorge?

Ans. Only one.

Ques. How many of those stakes did you find in the gorge?

Ans. I suppose I saw twenty-five or thirty
209 different stakes in there.

Ques. Did they belong to the new class of stakes you discovered outside of the gorge?

Ans. No, sir, they didn't.

Ques. How many, if any, of the new set of stakes did you find in that gorge?

Ans. None.

Ques. Did you at any time after the 19th of April go through the cañon from the head of the gorge up to McCandless Bridge?

Ans. Yes, sir; I completed a survey clear through that.

Ques. How many sets of stakes did you find above the gorge?

Ans. Only one. I found two or three old
210 stakes, was all.

Ques. To which stakes did the stakes belong which you found above the gorge?

Ans. The newer.

Ques. You found three or four of the old ones only?

Ans. Yes, sir.

Ques. Have you conducted any surveys of the D. & R. G. Railway Company outside of the Grand Cañon since the 19th of April?

Ans. I have.

Ques. What routes, have you surveyed on?

Ans. I started at the mouth of the Grand Cañon, crossed the river, went up Grape creek as far as Sand creek, crossed the divide between

FOLIO

211 Sand creek and McCandless Park, run down McCandless Park to the Arkansas river, and then went back; completed the survey through Grape Creek Cañon to the head of Pine creek, and down Texas creek to the Arkansas river, and from Texas creek over to Oak creek and down Oak creek to the Arkansas river.

Ques. What was the character of those different routes for practicability?

Ans. I should not consider them a practicable route at all, sir.

Ques. Have you at any time since the 19th of
212 April had any conversation with Mr. Robinson concerning the building of this railway up the cañon?

Ans. Yes, sir; I spoke a few words to him yesterday on the train?

Ques. Well, I don't care for that; what time in April; what day did you get into the Royal Gorge?

Ans. I think Saturday morning the 20th.

Ques. Who took the first gang of D. & R. G. men into the Royal Gorge?

Ans. I did.

Ques. How much of the Cañon did you traverse during that day, how much of that gorge did you traverse during the 20th?

Ans. Nearly the entire length?

213 Ques. What day and at what time did you see these stakes in the gorge that you have spoken of?

Ans. The old stakes.

Ques. Yes.

Ans. The morning I got in there, between five and six o'clock in the morning.

TESTIMONY FOR PLAINTIFF.

FOLIO

CROSS-EXAMINATION OF JAMES R. DE REMER.

Ques. You are an engineer by profession, are you?

Ans. Yes sir.

Ques. How long have you been engaged in your profession?

Ans. Several years—about eight years.

Ques. When did you first come into the employment of this Company?

Ans. In February, 1871.

Ques. Where did you first go to work?

Ans. I commenced on the divide between
214 here and Colorado Springs—worked to Colorado Springs.

Ques. You speak of this Grand Canon Royal Gorge, when was the first time you ever was in that?

Ans. In April of this present year, that is, in the gorge. I was with McMurtrie on the survey above McCandless Bridge

Ques. When was the first time you saw it?

Ans. I saw the Grand Cañon two years ago this last 4th of July, the first time I went through it was this present April.

Ques. You say you found two sets of stakes
215 there? Who was with you when you went through?

Ans. I had a party of men with me.

Ques. Was Mr. McMurtrie with you?

Ans. Not at that time.

Ques. How many old stakes did you find in the Grand Cañon before you reached the Royal Gorge?

Ans. Five or six.

Ques. Not to exceed five or six?

Ans. No.

Ques. What is the distance?

Ans. About three miles and a half.

Ques. Were they stakes of railroad survey, or ditch stakes?

Ans. They were stakes of a survey, railroad survey.

Ques. Was there not a ditch survey in there also?

216 Ans. No, sir, not at that place.

Ques. Did you ever find ditch stakes in there?

Ans. No, sir.

Ques. How could you tell whether they were a railroad survey or a ditch location?

Ans. A great deal of difference between them, in the first place, they would not construct a ditch at that point to run down, the country is too rough, could not build a ditch.

Ques. How near the mouth of the Cañon was the first stake you found in going up?

Ans. I don't recollect the distance, a very short distance above, half a mile I presume.

217 Ques. You found on an average a stake about every half or three-quarters of a mile through there?

Ans. I should judge so.

Ques. Were they scattered all through, or were they all in one locality?

Ans. At different points?

Ques. You found new stakes there also?

Ans. Yes, sir.

Ques. What were those new stakes, railroad stakes?

Ans. Yes, sir.

Ques. How near were they set together?

Ans. In most places set every fifty feet apart, in some places every hundred.

Ques. How many of the old stakes did you
218 find in the Royal Gorge?

Ans. I took thirteen out of the gorge. I suppose I saw twenty-five or thirty altogether.

Ques. In what distance?

Ans. A mile and a-half or a mile and three-quarters.

Ques. Allowing stakes to be set every fifty feet, how many stakes would there be in a mile and three-quarters, just a rough estimate?

Ans. One hundred and seventy-five stakes.

Ques. But you found only twenty-five or thirty?

Ans. Yes, sir; I expect a great many had been knocked out—been a long time since they had been in here.

Ques. Did you find them close together, or scattered at intervals?

219 Ans. In some places close together, in other places scattered apart.

Ques. How long a distance did you find without any stakes at all, those old stakes?

Ans. Eight or ten hundred feet in some places.

Ques. You met Robinson and Holbrook in a buggy at sun-down on the evening of the 19th?

Ans. I did.

Ques. At what point?

Ans. Near the mouth of the Royal Gorge.

Ques. How far from it?

Ans. About twelve hundred feet.

Ques. Below or above?

Ans. Below.

Ques. Which way were you going?

Ans. I was going out of the cañon.

Ques. Which way were they going?

FOLIO

220 Ans. Towards the the mouth of the canon.

Ques. They were going up?

Ans. Yes, sir.

Ques. State again what Robinson said to you?

Ans. He asked me what I was doing in there on their right of way. I told him I didn't know they had a right of way. I asked him whose right of way? He said the Atchison, Topeka and Santa Fé. I told him I wasn't aware they had a right of way. He said they had made a survey and filed their map.

Ques. Was Mr. Holbrook with him in the buggy?

Ans. He was.

221 Ques. Could Holbrook have heard the conversation?

Ans. He could.

Ques. Do you say, after thinking this matter over, that anything was said between you, Robinson and Holbrook, except to pass the time of day?

Ans. I am positive of what I say; I am under oath.

Ques. It occurred in that way he asked you what are you doing on our right of way?

Ans. He did, sir.

Ques. Was you on his right of way?

Ans. I was coming down over the line of road; he said right of way of the Atchison, Topeka &

222 Santa Fé Road very distinctly, sir.

Ques. How near to that point is there any Atchison, Topeka and Santa Fé Road?

Ans. Forty odd miles—there is a road at Pueblo.

Ques. Is that the Atchison, Topeka & Santa Fe, of which Mr. Robinson is acting engineer?

Ans. I don't know what is the name of that road—Pueblo & Arkansas Valley, I believe.

Ques. How far is it from that point to any point on the Atchison, Topeka & Santa Fe?

Ans. I don't know.

Ques. Yet Robinson told you you were on the
224 right of way of the Atchison, Topeka & Santa Fe?

Ans. Yes, sir, he did.

Ques. In the presence of Holbrook?

Ans. Yes, sir.

Ques. When Holbrook could have heard it?

Ans. Holbrook was in the buggy.

Ques. You say you got into the Royal Gorge on the 20th; what time?

Ans. Swam the river twenty minutes before four o'clock in the morning.

Ques. Took in a force of men?

Ans. I did.

Ques Who were in possession of the Grand Cañon below there at that time?

Ans. Nobody in the Grand Cañon at that time.

Ques. How large a force of men did you have?

Ans. I sent a foreman from the lower end of
225 the gorge with twelve or fifteen men, and I went in there with nine.

Ques. You said on your direct examination: I got into the Royal Gorge Saturday, the 20th—took in the first lot of men. How many men were there in that first lot?

Ans. Nine or ten of us.

Ques. Did they all swim the Arkansas River?

Ans. They did, sir.

Ques. Have you ever surveyed the route through the entire cañon, and the Royal Gorge?

Ans. I have.

TESTIMONY FOR PLAINTIFF.

FOLIO

RE-EXAMINATION OF JAMES R. DE REMER.

Ques. You say in your cross-examination that you met Mr. Robinson and Holbrook a little way
226 below the mouth of the Royal Gorge, in a buggy?

Ans. I mean mouth of the cañon—I meant to say.

Ques. Which side of the upper flume, below or above. Objected to. Objection overruled.

Ans. Below it.

Ques. You say you went into the employment of the Company in '71, in January?

Ans. Yes.

Ques. That you assisted McMurtrie in making a survey above the cañon, in '72, what year?

Ans. In '72, I believe.

Ques. At that time you were not in the cañon at all?

Ans. No sir. (Handed book.)

227 Ques. I ask you if this book contains the notes made of that survey? Objected to and question not answered.

JOSEPH BREWSTER, SWORN.

Ques. Where do you reside?

Ans. Rosita.

Ques. Are you in any way connected with the Denver and Rio Grande Railway at this time?

Ans. No, sir.

Ques. Have you ever been in any capacity?

Ans. Yes, sir.

Ques. At what time?

Ans. In January and February, 1871.

Ques. In what capacity?

Ans. Assisting Mr. McMurtrie in making a survey of the Grand Cañon.

FOLIO

Ans. I don't know what is the name of that road—Pueblo & Arkansas Valley, I believe.

Ques. How far is it from that point to any point on the Atchison, Topeka & Santa Fe?

Ans. I don't know.

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224 right of way of the Atchison, Topeka & Santa Fe?

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Ques. When Holbrook could have heard it?

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Ans. No, sir.

Ques. Have you ever been in any capacity?

Ans. Yes, sir.

Ques. At what time?

Ans. In January and February, 1871.

Ques. In what capacity?

Ans. Assisting Mr. McMurtrie in making a survey of the Grand Cañon.

FOLIO

Ques. How much of the Cañon did he survey at that time, if any?

Ans. Something over nine miles, I think.

Ques. At what point did he begin?

Ans. Begun at the bridge at Cañon City.

Ques. To what point did he go?

Ans. To McCandles's Park.

Ques. What did he do to mark and designate the line of his survey?

Ans. Placed stakes along the line.

Ques. Do you remember the distance at which he set the stakes apart?

Ans. A hundred feet the most of them.

Ques. Did you assist throughout the entire survey at that time?

Ans. Yes, sir.

Ques. Have you been in that Cañon since at any time?

229 Ans. I have been in above the Royal Gorge. I have never been through the Cañon since.

Ques. Did you go through at that time entirely?

Ans. Yes, sir.

Ques. Do you know at this time who set the stakes drove there?

Ans. I don't remember; I did some of them and the other parties that were assisting—changed works.

Ques. Did you at any time afterwards have anything to do with any work done in the Cañon in the way of grading?

Ans. No, sir.

Ques. Did you ever see any one at work up there on the line of that survey?

Ans. Grading? No sir.

TESTIMONY FOR PLAINTIFF.

FOLIO

JOHN K. BREWSTER, SWORN.

229 Ques. Do you hold any position in the Denver & Rio Grande Railway Company at this time?

Ans. No, sir.

Ques. Have you at any time heretofore?

Ans. Yes, sir.

Ques. At what time?

Ans. In 1871, the winter '70 and '71.

Ques. What, if any, assistance did you render any one in surveying a line through the Grand Cañon for the Denver & Rio Grande Railway Company?

Ans. At the time of that survey, in January and February, 1871, I kept camp there, in camp
230 about Soda Spring was supplying them with food, supplies, work of that kind.

Ques. Who at that time had charge of the surveying party?

Ans. Mr. McMurtrie.

Ques. You didn't go along with the company surveying?

Aus. No, sir.

Ques. Have you ever been through that cañon since that survey was made?

Ans. I think not, not all of it. I have been in parts of it, but only this year.

Ques. Do you know of your own knowledge of any work having been done by the railway company in the way of grading on the survey made by Mr. McMurtrie in 1871?

Ans. No, sir, only as men told me. I didn't see any work done.

Ques. Were you at or about the cañon from the 19th of April to about the first of May of this year?

FOLIO

Ans. Yes, sir.

Ques. Did you have any conversation with Mr. Robinson or Mr. Strong in relation to the building of this road through the cañon?

Ans. No, sir, not any.

Ques. Had you any conversation with any o the directors of the Cañon City and San Juan Railway Company?

232 Ans. I don't know that; I know who the directors are of that company; I had conversation with people at Cañon who I suppose were directors.

Ques. Who?

Ans. Well, Mr. Clelland, Alling, Rockafellow, Raynolds, are directors—Megrue. Yes, sir, I had I think some slight conversation—no very extended conversation.

Ques. Did you have a conversation with them as to who was building this railroad that they claim is theirs now?

Ans. No, sir; it was always spoken of by them in connection with the broad gauge from Pueblo—that is the way it was generally termed

233 broad gauge road from Pueblo.

Ques. Well, in any of their conversations with you in relation to the building of this road, what, if anything, did they ever say about the Atchison, Topeka & Santa Fé company building the road?

Ans. It has been usual, and, I think then the term Atchison, Topeka & Santa Fé was used. It has been usual to all at Cañon City. I reside at Cañon a portion of the time. Speaking of the construction of the road to call it the Atchison

234 and Topeka road.

CROSS-EXAMINATION OF BREWSTER.

Ques. Who did you have that talk with?

Ans. Well, sir, I spoke to Mr. Rockafellow.

FOLIO

Mr. Clelland spoke to me. Talked with Mr. Raynolds.

Ques. Tell us what Mr. Clelland said?

Ans. McClelland met me one day on the streets knowing that I was living there, and my connection with the Central Colorado Improvement Company, perhaps led him———. Objected to. He said to me: Sir, I understand that the Denver & Rio Grande Company are going to lay iron along the street here. Wanted to know if I knew it was so—true. Told him I did not.

Ques. Was that all?

Ans. That was about the sum and substance of what he said then; I don't recollect I had any more conversation with him about the road.

Ques. Tell us what Mr. Rockafellow said?

Ans. Any conversation I had with him in regard to the matter was, that he was sorry that there should be such an opposition to the extension of the broad gauge road, our road he spoke of.

236 Ques. Did he say broad gauge, or our?

Ans. He said both.

Ques. Which did he say?

Ans. He said both, sir.

Ques. Tell us what Raynolds said?

Ans. I don't know that Raynolds' conversation, sir, was particularly with regard to the construction of the road, it was more with regard to business; some fault which he was finding with Denver and Rio Grande Road for what he understood to be some change of policy, growing out of the railroad contest which was going on at that time.

Ques. That was all of that?

Ans. I believe so; yes, sir.

TESTIMONY FOR PLAINTIFF.

FOLIO

237 J. E. CARTER, SWORN.

Ques. Have you ever been in the employ of the Atchison, Topeka & Santa Fé Railway?

Ans. I have, sir.

Ques. In what capacity?

Ans. Well, of the Atchison, Topeka & Santa Fé Railroad Company in the capacity of bridge department first; the first work I did was on the Kaw River bridge, at Topeka.

Ques. Have you at any time since the 19th of April been employed in and about the construction of a road in the Grand Cañon of the Arkansas?

238 Ans. I have, sir.

Ques. In what capacity was you there employed?

Ans. I was the general foreman there in charge of the men.

Ques. Who employed you to take charge of these men?

Ans. Mr. Robinson hired me, sir; Mr. A. A. Robinson.

Ques. About how many men did you work there?

Ans. Well, there was fifteen foremen of those men, no one had less than twenty men, some of them had as high as sixty.

Ques. And you had control of the whole; you were superintendent of construction as I understand?

Ans. No, sir; I was simply foreman in charge;

239 I never saw any superintendent of construction whilst I was there.

Ques. About what time in April was it you went there?

Ans. Sometime between the 20th and 24th; I

FOLIO

don't remember exactly; I think though the 22d or 23d.

Ques. Did you know any of the men who were employed in that cañon as laborers?

Ans. Yes, sir.

Ques. Do you know from where they were sent to that cañon to work?

Ans. Well, I know there was three or four of the foremen were sent off the main line of the road, one in particular, was sent from Osage.

240 Ques. That is in Kansas, is it?

Ans. Yes, sir.

Ques. Do you know by whom they were sent?

Ans. No, sir, I do not.

Ques. Did you recognize any other men who had occupied positions on the road, any part of it, between Kansas City and Pueblo, section men?

Ans. Yes, sir; there was a man by the name of Fry, he was foreman; a man by the name of Holly, who run a floating gang; a man by the name of Bolander, who was running a section at Osage,

241 who had been on this Osage section previous to my coming to the cañon.

Ques. Who made out pay checks for these men?

Ans. There was a time keeper, assistant time keeper and clerk; they made them out; I signed them across the face; Robinson countersigned, and they were then paid—or Mr. Morley. Mr. Robinson was not there at all times. Mr. Morley used to do it. Also, Major Tom Anderson.

Ques. Do you know where the funds with which these men were paid came from?

242 Ans. They came out of the Fremont County Bank. That is, the second day they were paying off they run out of money; Mr. Raynolds came

FOLIO

to me; says he: I will have to close up, can't let you have any more, because I must protect my depositors. Says I, You can't stop now. I didn't see anything about the money after the work was stopped by an injunction. The men during my time were not stopped by an injunction. The injunction was served the day I left. Mr. A. A. Robinson gave me a check for my services. Bradley, agent at Pueblo, cashed it for me.

243 Ques. Whose agent is he?

Ans. Supposed to be agent of the Atchison, Topeka & Santa Fé Railway Company—was at that time.

Ques. In any of your employment and operations in the Grand Cañon, what control over you had the Cañon City & San Juan Company?

Ans. Well, to tell you the truth, sir, I didn't know there was such a company until I had been there seven or eight days. That gentleman there told me—Mr. Clelland. The first official notice I had of it was from Mr. Robinson, to change the checks and write Cañon City & San Juan Railway Company. Also, make my pay-rolls out the same way.

Ques. What, if anything, do you know about special trains being sent from Kansas City over the Atchison, Topeka and Santa Fé road to bring men out to work on this Cañon? Objected to as unimportant and objection sustained.

Ques. What do you know about the Atchison
245 and Topeka Company or its officers for a few days after the 10th of April gathering up men along its line of road and sending the men to work in this Cañon?

Ans. I know there were men gathered up in every town along the line of road, upon my ar-

rival at Cañon. I know some of these men were sent from Topeka, I identified some of these men, because I had seen them around Topeka. I presumed the Santa Fé Road took them there.

Ques. After the men were stopped working by the injunction, where did they go to get their

246 pay that was in arrears?

Ans. Well, I have been recently employed on the Kansas Pacific Road, some of the men I had there in the Grand Cañon worked for me on the Solomon Valley Branch of this road, and they told me (objected to) my own knowledge is I identified two men to Mr. Moore previous to my leaving, I took the men up and identified them as men having worked there. I presume they got—Mr. Moore was the paymaster of the road.

Ques. Of what road?

247 Ans. Of the Atchison, Topeka and Santa Fé. Whether they got their money or not, I don't know.

CROSS-EXAMINATION OF J. E. CARTER.

Ques. How long did you remain in that official position or employment up there?

Ans. About sixteen days. I was there, sir.

Ques. What was that position, what did you do?

Ans. I stated I was in charge of the foremen there and the men, looking after the men in capacity of general foreman over other foremen, and the men and the work.

248 Ques. What were you told were your duties when you went to work?

Ans. My duties, I was told to hold that line as near as I could.

Ques. You took charge of the other foremen and their men?

FOLIO

Ans. Yes, sir.

Ques. You didn't remain in the employ of that company long, the San Juan Company up there?

Ans. Sixteen days.

Ques. There was a little disagreement, was there not, and you was discharged?

Ans. The disagreement happened after I left there.

Ques. You were discharged?

Ans. Yes, sir. I left there after I got to Topeka. I was transferred from that road over to the Trinidad division of the road. While in Topeka
240 Robinson sent me a telegram that my services would not be required. I resided at Jackson.

Ques. Have children?

Ans. I have.

Ques. A wife?

Ans. She is dead.

Ques. At the time you were at Cañon City, were you not insisting upon going home because your wife was very sick? Objected to. No answer.

Ques. You say that you know these men were gathered up all along the road at every town?

Ans. Well, there was one town was going to return a vote of thanks to the Atchison, Topeka and Santa Fé for taking out the tramps and paupers. I was right at the roadmaster's office when they were put on the train.

Ques. Had they been in the employ of the Atchison, Topeka and Santa Fe before?

Ans. I don't think they had.

Ques. You say some of the men you recognized had been in their employ?

Ans. I don't know how long. Andy Bolander had been several days to my knowledge.

Ques. How long was it before that you knew
251 him to be in the employ of the Company?

Ans. Well, a week or ten days, such a matter as that.

Ques. How many other men did you recognize?

Ans. Mr. Holly, a gentleman who runs a floating gang there—he is a foreman.

Ques. Who else?

Ans. Mr. Hi. Ream, Oldman, Jim Morton, a man by the name of Fry.

Ques. Who else?

Ans. Well, there was Bolander's brother.

Ques. Who else?

Ans. Well, I don't know Mr. Reed, that I can enumerate every man. I can simply say this, section men were picked up and sent from all
252 along the line. I know it, because I recognized the men. Passed them back; had orders to.

Ques. Where have you been for the last two weeks?

Ans. Right here. First of July finished short road, twenty-two miles of it. I came down here with Mr. Edgerton. Saw an officer of the road, told me he had had nothing to do at present. If I would wait a little while—.

Ques. When were you first told you would be wanted as a witness?

Ans. I don't know. I believe the first time I was told, up in Mr. Macon's office.

253 Ques. How came you to come to me on the street, on Saturday, and tell me that you were subpœnaed by the Atchison, Topeka and Santa Fe, and went to know when we were going to want to use you. *Witness objects* to answering.

FOLIO

Ques. When did you commence the construction of that road on Salomon's Fork.

Ans. I didn't commence.

Ques. You say a man at Pueblo cashed your check.

Ans. That is what I said.

Ques Who drew the check, on what bank?

Ans. Never noticed the check, I noticed the amount, sixty-four dollars, Bradley passed it
254 right over to me, he cashed it I believe.

Ques. It was drawn on a bank, was it not?

Ans. I suppose it was, it was a check I never noticed, I am certain it was not one of the company's time checks, was not taken to be.

Ques. Such as are usually drawn on banks?

Ans. I disremember whether it was or not, he wrote the check up stairs, and said have you got money enough to cash this check.

Ques. Who were these men you identified before you left Topeka?

Ans. They were men I had working up with me before I came to Topeka, sir.

Ques. Up where?

255 Ans. In St. Louis, some of them, some of them on the Iron Mountain Railroad.

Ques. For what purpose did you identify them there?

Ans. What would I identify you for, because I simply said how do you do King, or whatever the name, I saw the men in Topeka.

Ques. That is, you mean——

Ans. I took up to Mr. Moore those men that were at work for me in the Cañon, that is the reason I identified them, neither of them had checks, there was some row about the back pay they claimed I was to give and didn't, they asked me

if I would go up and identify them, so they could
256 get the money.

Ques. You went up with them for the purpose of identifying them, and telling them they were the men they claimed to be, they had no time checks or anything else at that time?

Ans. They didn't show any to me.

ALEXANDER THORNTON, SWORN.

Ques. Where do you reside?

Ans. At Rosita, Custer County, Colorado.

Ques. Did you ever do any work for the Denver & Rio Grande Railway Company?

Ans. Yes, sir, I did.

Ques. Where did you do it?

Ans. In the Grand Cañon of the Arkansas.

257 Ques. What time did you do it?

Ans. During the month of May, 1871.

Ques. What was the character of that work?

Ans. Grading for a road bed for a railroad, as I understood it.

Ques. Was there anything there to guide you in your work in the way of stakes?

Ans. There was stakes there with figures on them, said to be placed there by the engineer.

Ques. Who took you to the place and showed you what to do?

Ans. Mr. Workheiser.

After you had finished your work, how was it prepared for a road bed?

Ans. We built on a level with the line of stakes
258 and made a road bed for about six or eight feet wide.

Ques. So far as done, was it complete or incomplete work?

Ans. I think it was complete. It was about the width Workheiser asked us to make it.

FOLIO

Ques. Leveled?

Ans. Yes.

Ques. What, if any, walls did you build there?

Ans. We built walls on the lower side of the bank in places; they must have been ten to fifteen feet high, in other places no more than two or three feet.

Ques. What, if any work did you find had been done of the same character you were doing?

259 Ans. When we went in there for a distance of three hundred feet there was indications of work having been done in small patches, but no regular grading, like what we did ourselves.

Ques. When did you discontinue your work?

Ans. We had connected some of this, some was still disconnected. This was in May, 1871.

Ques. What difficulty would there be in a person passing through that cañon on the same side that this work was done, discovering that this work was there? Objected to.

The Court. That is his opinion. State what was done.

Ques. Have you been in that cañon since?

260 Ans. Not at that particular point. I have not. I have been in the cañon lower down, but never at that particular place where we worked.

Ques From what point did you enter the cañon, and from what point did you leave it when you had completed your work?

Ans. Entered in the side of the cañon, some distance above there, probably about five hundred feet above the Royal Gorge.

Ques. Did you leave by the same route. Objected to as immaterial.

Ans. Yes, sir; left by the same route.

FOLIO

CROSS EXAMINATION OF ALEXANDER THORNTON.

261 Ques. That was in May, 1871?

Ans. Yes, sir.

Ques. How many men employed there?

Ans. Three men employed about one month.

Ques. Do you recollect the number of days?

Ans Twenty-two days.

Ques. How much work had been done there when you went there?

Ans. I could not tell, a number of places, spots ten or fifteen feet in width, I should suppose.

Ques. A little scratching on top of the ground?

Ans. No connected work at all; it was merely in patches.

Ques. All the work that was done after that
262 to your knowledge was twenty-two days work for three men?

Ans. That was all that we done; I don't know anything about how much. There was several places where we built wall, one place twenty or thirty feet long, and ten or fifteen feet high.

Ques. What kind of a wall was it?

Ans. It was a dry wall, built with rocks we found there, in one place it must not have been less than fifteen feet high.

Ques. The balance of the way how high?

Ans. In places it was not more than two or three feet, this high place a kind of a little gap
263 washed out in the bank I don't suppose the highest part of it was more than ten feet in length, could not have been from the foot of the ground.

Ques. What was the character of the ground where you were?

FOLIO

Ans. It was a sloping bank, kind of a slide, rock soil carried down from above.

Ques. About what angle did the ground slope there?

Ans. I should think about forty-five degrees.

Ques. How wide was that valley?

Ans. No valley at all, nothing but a cañon below us.

264 Ques. What was there where you were?

Ans. Where we were it seemed to be a kind of natural bench where this slide rock settled upon.

Ques. How far were you above the head of the Royal Gorge?

Ans. Wasn't but two or three hundred feet.

Ques. How near the Royal Gorge was the end of your work?

Ans. I couldn't exactly say, wasn't but a short distance, the whole distance we worked didn't exceed five hundred; from this gulch we went down to the Royal Gorge; betwixt this and the Royal Gorge is the work we did; Mr. Rockafellow employed me; Werkheiser took us up and showed us where to work.

Ques. Who was Werkheiser?

Ans. He was a gentleman in the employ of Rockafellow; I believe as a clerk.

Ques. You never have been at that point since that time, at the place where you worked?

Ans. No, sir, I never was; I have been above in the Cañon.

W. J. ROBINSON, SWORN.

Ques. Did you ever do any work in the Grand Cañon?

Ans. Yes, sir.

Ques. For whom did you do it?

Ans. Mr. Rockafellow employed me.

266 Ques. What was the character of the work you did?

Ans. In the shape of a grade.

Ques. For and with whom did you work?

Ans. I don't know; they told me I was working for the Rio Grande Company; I worked with Mr. Thornton and Mr. Pringle

Ques. You say this work was intended as a grade for what?

Ans. Railroad, I suppose.

Ques. Stakes there; you completed it there as far as you did it?

Ans. As far as we done, we made it as near complete as we could.

Ques. What did you work by, who showed you where to work and how to work?

Ans. There were some stakes along where we worked; Workheiser went up with us and showed

267 us where to work; there had been some work done previous; it had been worked in spots along; we worked more in one place; levelled along as far as we went.

Ques. How much of this disconnected work did you level up with the work you did?

Ans. I don't recollect; it might have been a hundred or two hundred feet.

Ques. What, if any, walls did you build or put up there to retain the bed of road in its place?

Ans. We built one or two in different places, two, I believe; one we built up about level and

268 the other we did not quite finish, as near as I recollect.

Ques. What was the character of this masonry, substantial or tumble-down work?

FOLIO

Ans. Well, we built as substantial as we knew how, as well as I recollect, it was between two and three feet thick; the rocks were of a flat nature and built as straight as we could

Ques. How far above the Royal Gorge, if above at all, was this work done to the best of your recollection?

269 Ans. It was only a short distance; I could not exactly tell how far it was.

Ques. Have you seen that work since you left it?

Ans. No, sir.

Ques. Have never been in the cañon since?

Ans. No, sir, I have not; not at that point.

CROSS-EXAMINATION OF W. J. ROBINSON.

Ques. State how many men you worked there?

Ans. Three.

Ques. How long?

Ans. I think it was twenty-one or twenty two days, as near as I can recollect.

Ans. How much work had been done before you went there?

270 Ans. I don't know; I saw there was considerable work had been done in places.

Ques. Scratching, eh?

Ans. In places grading for five or six feet; little points; eight or ten feet in a place; twenty, perhaps; Mr. Workheiser showed us where to go to work.

Ques. What engineer in charge?

Ans. No engineer.

Ques. Who superintended the work while you were there?

Ans. Workheiser.

Ques. How often did he come?

Ans. He came twice, I believe.

Ques. Was that the entire force engaged on that road at that time?

Ans. That was all I seen.

Ques. Did you hear of any other force at any other time?

Ans. No, sir, I did not.

271 Ques. That was in May, 1871?

Ans. Yes.

ROBERT F. WEITBREC, SWORN.

Ques. What position, if any, do you hold in the Denver & Rio Grande Railway Company?

Ans. I am the treasurer.

Ques. Can you explain the business transactions between the Denver & Rio Grande Railway and the Union Contract Company—how they contract and operate together?

Ans. The Union Contract Company is a Pennsylvania corporation, that was organized for the purpose of constructing railways, and it has a con-

272 tract with the Denver & Rio Grande Railway to build its line of railway from Denver to El Paso, and the stipulations of the contract are that the road shall be built. Objected to.

Ques. In carrying out this arrangement, who makes the survey, the contract company or the railway company?

Ans. The Engineer of the railway company?

Ques. Under whose supervision and control?

Ans. Well, I suppose it would be competent to say, to express the wording of the contract in answer to that question. It is stated that the

273 railway shall be constructed in accordance with surveys that are made by Engineers of the railway company.

FOLIO

Ques. In making these surveys, who pays the Engineer, and to whom does he report?

Ans. The officers of the Denver & Rio Grande Railway control him, but it is stipulated in the contract that the Union Contract Company shall pay all the expenses.

Ques. The railway company controls the route, and accepts or rejects the survey?

Ans. Yes, sir.

Ques. Or does the other company do that?

274 Ans. The railway company does that. Defendant objects to that mode of examination.

Ques. Were you in Cañon City on the 19th of April last?

Ans. I was.

Ques. What time did you reach there?

Ans. I reached there about, well, between three and four o'clock, to the best of my recollection, in the afternoon.

Ques. Were you at the mouth of the Grand Cañon that afternoon, or in the mouth of it above the flume?

Ans. I was; yes, sir.

Ques. Did you see Mr. A. A. Robinson, Chief Engineer of the Atchison, Topeka and Santa Fé Railroad that day?

Ans. I did.

275 Ques. Did you see him at the mouth of that Cañon?

Ans. I did, just as I was coming out

Ques. Did you have any conversation with him at that time?

Ans. I had a conversation with him, he stopped, and we passed the time of day, and he said somewhat excitedly, so you are up here on our right of way, and I replied in much the same tone,

that we were not on their right of way, that we were on our own right of way.

276 Ques. About what time of day was that?

Ans. Well, it was about sunset, I should think, six o'clock, as near as I can recollect.

Ques. Do you know how many, if any, men came up on the night of the 19th, or in the morning of the 20th of April last, to work on that Cañon, to work on the road in that Cañon for the so called Cañon City and San Juan Company?

Ans. I have no certain knowledge, all the information I have is from estimating as I saw the men go through the streets, and from hearing the reports.

277 Ques. Do you know where those men came from, and who sent them up there?

Ans. I only know from common report in the streets, and from what Mr. Strong himself told me.

Ques. What did he tell you?

Ans. He told me that they had brought about three hundred of their section men and other track laborers from the line of the Atchison, Topeka and Santa Fé Railroad, and put them to work on that right of way claimed by the Atchison, Topeka and Santa Fe, claimed by Mr. Strong.

Ques. He did not say they were put to work on that right of way, claimed the evening before,

278 on the evening of the 19th, by Mr. Robinson?

Ans. No, not on the evening of the 19th, this conversation I had with Mr. Strong, as I remember.

Ques. I say they were put to work ——

The Court. The whole question is irregular. The form of the question is objectionable.

Ques. What conversation, if any, have you

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had since the nineteenth of April with either Mr. Robinson or Mr. Strong, in which they, or either of them, stated to you that the Atchison, Topeka
279 and Santa Fé Company was building this road in Grand Cañon? Objected to.

The Court If there is any conversation inquire particularly.

Ques. What conversation, if any, have you had with William B. Strong or Aaron A. Robinson, or either of them, in relation to the company who are building this road in the Grand Cañon? Objected to. Objection overruled.

Ans. I will not be certain now whether it was nine o'clock Saturday, the 20th, or 9 o'clock the evening of Friday, the nineteenth of April, but it was one or the other, that Robinson came to my
280 room in the McClure House in company with Mr. Gast and Mr. Raynolds, and Mr. Raynolds presented me a letter, a formal letter which he had written, charging our men with obstructing the cañon and preventing the men of the Cañon City and San Juan Company going in there, and I am not certain now whether it was stated in that letter or whether it was stated in conversation, that fire-arms had been presented to prevent their men passing. I disclaimed any intention of sanctioning anything of that sort. It was
281 not done to my knowledge. In the course of the conversation I can't recall how it came up. Mr. Robinson referred to Mr. Holbrook as the Chief Engineer of the Cañon City and San Juan Company, and the inference—— Objected to At that time then I said it was no use saying anything to me about the Cañon City and San Juan Company, that we knew that was a straw company, and the Santa Fé Company was working

there; and there was a blank silence all around the room for a moment or two. In a short time
282 they left. That was all the conversation I had on the subject.

Ques. As an officer of the Denver and Rio Grande Company, what do you know about an attempt by the Denver and Rio Grande and the Atchison, Topeka and Santa Fé Railroad Company to make an arrangement for the construction of this road through the Grand Cañon sometime in April or May last in St. Louis, at which Gen. D. C. Dodge was present. Objected to as immaterial and incompetent.
283

The Court. I don't think you can go into that. If you propose to show merely that they were negotiating for some arrangement, that is not within the line of our inquiry; we are inquiring who was building this road; that is our inquiry. Objection sustained.

CROSS-EXAMINATION OF WEITBREC.

Ques. How long have you been connected with the Denver & Rio Grande Railway Company?
284 Ans. Since September of 1871.

Ques. How long have you been connected with the Union Contract Company?

Ans. The same period.

Ques. You say that this Union Contract Company is a Pennsylvania corporation?

Ans. It is.

Ques. A corporation separate and apart from the Denver & Rio Grande Railway Company?

Ans. It is.

Ques. Who are the officers of it?

Ans. Charles S. Hinchman, of Philadelphia, is the president, and William Wagner, of Colorado

Springs, is the secretary, and the directors of which there are five; I don't know that I can give all their names: Charles S. Hinchman, Josiah C. Wright, of New York, Henry McAlister, of Colo-Springs, are three of the directors. I can't at this moment recall the other two of them.

Ques. It is their business to construct the road?

Ans. Yes.

Ques. Do they construct and equip?

Ans. After the road is constructed, finished and equipped, they delivered it to the Denver & Rio Grande Company.

Ques. Has the Denver & Rio Grande ever built a mile of railway?

286 Ans. Only through this Union Contract Company, by making contract with them.

Ques. Of itself, has never built any road?

Ans. No, not of itself.

Ques. Built them by the other corporation?

Ans. Yes.

Ques. You say that the engineers are under the control of the Denver & Rio Grande Company, but work for the Union Contract Company; do I understand you right?

Ans. I can only repeat the language of the contract, which says:

Ques. I don't ask you to repeat the language
287 of the contract, after you have been connected with this company that length of time?

Ans. The Denver & Rio Grande Railway Company controls the engineers, the engineers select the route of the railway, the Union Contract Company builds the railroad on that right of way on whatever selection they make.

Ques. Who pays the engineers?

Ans. The Union Contract Company.

FOLIO

Ques. Tell the Court, please, what control the Denver and Rio Grande Company exercise over an engineer, or ever have.

288 Ans The Denver and Rio Grande invariably sends the engineering party to select the line of Railway, the line upon which they want a road built, they have the right to control any detail whatever in regard to the location of the Railway.

Ques. By that, you mean they have the right to control just where the Railroad shall be built, you mean along what particular route?

Ans. Yes, sir.

Ques Who pays them?

Ans. The Union Contract Company, sometimes.

Ques To whom do they make their report?

289 Ans. To the president of the Denver and Rio Grande Railway.

Ques To the Union Contract Company also?

Ans. They sometimes do.

Ques. To whom do they furnish profiles?

Ans To the president of the Denver and Rio Grande.

Ques. As a matter of fact, the Union Contract Company has the profiles in its office?

Ans. Yes.

Ques. Has all the road that has been built ostensibly by the Denver and Rio Grande Company been built by this Contract Company?

Ans. Yes, sir.

Ques. Who provides the right of way for the road?

290 Ans. The Union Contract Company has managed that wherever they could get a deed for the right of way, and they have always had the deed made to the Railway Company. Where it was

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necessary to condemn land it had to be done in the name of the Denver and Rio Grande Railway, and the Railway Company did it

Ques. It was done in their name by the Union Contract Company?

Ans. It was done by the Denver and Rio Grande Railway Company.

Ques. Where you paid consideration for right of way, who paid?

291 Ans. The Union Contract Company.

Ques. Where the Denver and Rio Grande Company condemned right of way, had to pay damages, who paid that?

Ans. The Union Contract Company.

Ques. You say you saw Mr. Robinson on the night of the 19th somewhere near the Grand Cañon, and he said, you are up here on our right of way?

Ans. That is my recollection substantially.

Ques. You were little excited; you answered you was on your own right of way; that was all the conversation that took place?

Ans. That was substantially as far as my recollection serves me.

Ques. You had another interview with Mr.

292 Robinson in the presence of Mr. Gast, did you not?

Ans. I did.

Ques. On the 19th or 20th?

Ans. I did.

Ques. In which you told them the Cañon City and San Juan was a straw company; it was nothing but the Atchison, Topeka and Santa Fé building the road, and all they said was blank silence.

Ans. That is about it.

Here the plaintiff's rest their case.

TESTIMONY FOR DEFENDANT.

FOLIO

MONDAY.

Defendant called *H. R. Holbrook*, (who had been sworn):

Q. State what position you occupied in the spring of 1877? A. I was Chief Engineer of the
293 San Juan Railroad. Q. State whether or not you had a contract with them for making surveys through the Grand Cañon. A. Yes, sir. Q. What did you do in pursuance of that contract? A. I went on and made a survey for twenty miles, and made a map of the road. Q. In what direction? A. Up the river, west from Cañon City, with Mr. Brandegee and Mr. Stimpson, and several other men. Q. State the character of the survey; how closely it was made, what you did. A. I run a transit line through the Cañon, and kept the
294 courses, fitted in the curves, measured the distances with a chain, and put in stakes from every fifty to hundred feet, generally fifty feet. Q. Was there any part of the Cañon you didn't go through? A. No, sir. Q. Was there any part of it you didn't stake? A. No, sir. Q. Have you got your field notes here? A. Yes, sir. Q. Have you got your plat and the alignment? A. Yes, sir. Q. Did you prepare a profile? A. Yes, sir. Q. You can produce those. A. That is a copy
295 of the transit notes. These are the level notes, profile of the line. Q. I will ask you what the character of the survey was you made through this box part of the Cañon, the Royal Gorge? A. I run an angle line through there. Q. What do you mean by an angle line? A. I only turned the angles; I didn't fit in any curves. A preliminary or base line to locate from. Q. After making this survey, what did you do then? A. As

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the Chief Engineer of the Cañon City & San Juan Company, in reference to it I made a map of the
296 line for twenty miles above Cañon City. Q. What did you do with that map? A. I presented it, turned it over to the Company, to file it with the Secretary of the Interior for right of way; made a map and also estimates of the cost of construction of a railroad. Q. Did you report those estimates? A. Yes, sir. Q. To whom? A. To the San Juan Company. Q. When you were making the survey through there in the spring of '77, did you find any other stakes at that time set through the Cañon? A. I saw a few; yes, sir.
297 Q. From your best recollection, how many did you see? A. Well, I don't recollect. I saw now and then an old stake; I suppose perhaps ten or a dozen through the Cañon. I don't know I didn't count then. (Handed map.) Q. State whether or not that is a tracing of the map that was prepared by you for filing with the Secretary of the Interior. A. Yes, sir. There are no field notes on it; the notes of the alignment are not on the map. I think it is a true tracing of the alignment, but not showing the field notes. The one that was filed the notes of the alignment are on
298 the map, points of beginning and end of curve, and the degree of the curve, and the number of degrees turned. I think it is correct otherwise. Witness produces a map, which he said he made originally, and has the field notes on. Offered in evidence by the defendant and received. Q. I understand you to say that to the best of your recollection you only found some ten or fifteen of the old stakes. A. I didn't count them; I should judge about that number. I saw one oc-

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299 casionally through the Cañon. Q. Did you see any work that had been done before that time in the way of actual grading of a road? A. Yes, sir; saw some work; it was about the center of the Cañon, six miles above Cañon City. Q. State of what that work consisted. A. Some grading done; some retaining walls built for a distance of from three to five hundred feet, I should judge. Q. What money value would you place upon the character and amount of work done there at that

300 time. (Objected to, and objection sustained.) Q. State particularly of what that work consisted. A. There were three or four small gulches on the top of a bench on the north side of the river, about fifty feet above the river, that were filled with earth, and retaining walls were built on the outside embankments that were built across those gulches. Q. Does the road of the Cañon City and San Juan Company, as it was located by you, run over that same line that was partially constructed? A. Yes, sir. Q. Do you mean that

301 that work is included within the right of way? A. It would come partially on our road bed; perhaps wholly. I don't think wholly, but partially. Our grade line would be considerably lower than that. In excavating we would probably take a portion of that road bed.

Cross-examination of Holbrook: Q. In the spring of 1877 you were in the employ of the Cañon City and San Juan Railroad Company as Chief Engineer, you say? A. Yes, sir. Q. And you made this survey, you say; you made an angle line and marked the curves on the ground,

302 putting the curves on the ground, did you, or on the plat? A. No, sir. Q. In the same way Mr.

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McMurtrie explained it might be done. A. No, sir, not exactly. Q. Substantially the same way? A. Not exactly; I had to change the tangents some to fit in the curves. I run a base or preliminary line through the Cañon, and then deduced a located line from that base line; that is the one I filed. Q. You say you stuck stakes every fifty feet, or about that, generally. How far did you stake the stakes apart in the Royal
303 Gorge? A. I am not certain whether I put them fifty feet apart in the Royal Gorge or not. They were a hundred feet or less through the Royal Gorge, and outside of that they were put in every fifty feet, and sometimes oftener. Q. Now, in the Royal Gorge, where did you set your stakes, in the earth or in the ice? A. On the sides of the Cañon whenever we could, and around some rocky points, or under some perpendicular rocks.
304 We set our stakes in the ice near the rocks, and deduced a location from that. Q. You say you set some stakes on the ice. About what proportion of all the stakes in the Royal Gorge were set on the ice? A. Well, I don't recollect. Q. That is, you mean you don't recollect exactly, mathematically; but can't you approximate it? A. Well, I presume half of them, probably; maybe two-thirds were set on the ice. Q. Now, you say that retaining wall and that work done by the D. & R. G. Company in '71 is about fifty feet
305 above the water, forty-five to fifty feet, and you say your line runs partly on that work. A. Well, the centre line is hardly on it; it is nearer the river. Q. Can you give the Court an idea how close your centre line would run to that work? A. It runs in places as near as five feet to it. Q.

In other words, your line would go a little lower than that line there. A. Yes, sir. Q. How can you call that a survey, when your stakes are set forty or forty-five feet below your line; if you set them in the ice of the river, how can you call it a staked line in that gorge, and the stakes forty or
306 forty-five feet below it in some places? A. It was staked, but I deduced a located line. Q. Didn't you say you surveyed and staked this line, and set stakes a portion of the way every fifty feet in there? Do you call that a staked line, where the stakes are forty or fifty feet below the line of survey? Did you ever make any other but a preliminary one? A. Not through the Royal George; I didn't stake it. Q. Then it is
307 true you never did survey a staked line in the Gorge. A. No, sir; I run a connected line all the way there, but I didn't put in the stakes on my located line in the Royal Gorge. Q. Then the truth is, in tracing and attempting to trace your line by stakes, it could be done well enough till you got to the Royal Gorge, but then a person that didn't make the survey could not trace it at all following the— A. He could trace it with an instrument if he had the notes showing him where each stake was, and how far below the grade. Q. Does this plat or map, as you call it in engineering parlance, show where the stakes are
308 when you look for the stakes? A. No, sir; it shows the location deduced from preliminary line. Q. Could an engineer take this and go through the Gorge; the Royal Gorge, and find your line from any stakes you set there, by this map? A. Yes, sir, he ought. Q. How could he do it when the stakes were set in the ice and washed away?

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retaining walls you saw, you may state what state of preservation they are in—pretty firm? A. No,
315 sir; the highest one is not; it is bulged out in the center, and looks as if it might fall down very shortly; the low walls are in a fair state of preservation. Q. You say they are fifty feet above the river? A. About forty-five. Q. Did you ever measure it? A. Yes, sir. Q. Measured it and found it about forty-five feet? A. Yes, sir. Q. Did you go through the entire length of the Royal Gorge on that survey, or did you have to come out of it and go around? A. There was one point of 265 feet that I had to go up and come down; one point about the centre, where the river was not frozen over, and the walls were
316 perpendicular on each side, and it was impossible to get past without going to the top; that 265 feet we triangulated and got our distance across; continued our line across that. Q. Making your survey, did you connect your survey with the township lines and section corners? A. Yes, sir; the township line; the section lines were not run at that time. Q. And you made a perfect survey without having the section lines to connect with? A. Yes, sir; if the townships were run out after, it is correctly sectionized. Q. Was not that section immediately west of Cañon and embracing
317 the Grand Cañon, subdivided at the time you made your survey? A. No, sir. Q. How long after that was it subdivided, or is it now? A. I think it was subdivided last winter; am not certain about that. Q. After you had made your survey, returned your plats and put in this curvature and all that sort of thing, as you have testified, how do you find the line when you come to

build on it; do you have to make corrections or do you not? A. Sometimes we revise the lines a little—make detailed changes. Q. To what extent do you have to leave in any part of the line; do you have to leave the old survey you made in 1877? A. Well, generally a very short distance—five or ten feet perhaps. Q. What is the greatest distance you have had to leave it any one place up to this time? A. I don't recollect exactly. Q. Do you generally have to go above the line of survey or below? A. Well, we have generally to run below as a rule; sometimes we are right on the line exactly, sometimes a little above or a little below, generally a little below. Q. Is it not a fact that in the construction of the line up to this time, that you have had to vary in
319 some places one hundred and twenty feet? A. There may be one place where we vary that much. Q. And you are constructing on that varied line; are you now the company? A. I don't know whether they have men at work on that now or not. Q. Then the line that you made was not so very accurate notwithstanding you put all the curves in; the survey you made and the map you filed with the Secretary of the Interior was not so very accurate, notwithstanding you put out in the curvature? A. Yes, sir; it was an accurate map of the line? Q. As much so as com-
320 mon? A. Yes, sir; as much accurate as they are usually run. Q. Is it usually the case that companies make their survey and correct it as they build? A. Usually, more or less. Q. It is not necessary to an accurate location of a line that it be so perfect it will need no change when they come to construct? A. No, sir; I never knew it to be so; never knew a perfect location.

TESTIMONY FOR DEFENDANT.

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Re-examination: Q. State the reason why you did not stake your located line through the Gorge?
321 A. In many places the rocks are pendicular; it is almost impossible to put stakes in them without a great deal of trouble and expense. Q. State whether in the manner you located your line it was a correct location, drawn from your base line. A. Yes. I have a plat of my deduced line from the base line and the location line on a large scale.

Here court adjourned till 9 o'clock A. M. Tuesday, July 23d.

TUESDAY.

Defendant called *Robert F. Weitbrec*,—sworn:

Q. You stated yesterday that you were Treasurer of the Denver and Rio Grande Company. A. Yes, sir. Q. What office do you hold in the con-
321 struction company, the Union Contract Company? A. I am Treasurer of that also. Q. How long have you been connected with the first corporation, the Denver and Rio Grande. A. Since September, '71, with the exception of some little work that I did when the certicate of incorporation was first filed. No, it was earlier than that; it was as early as June. I was connected with the Denver and Rio Grande since June, '71; it was a mistake I made yesterday. Q. How long
322 with the other corporation? A. The same period. Q. How much road had been constructed by your company when you became conuected with it, I mean the Union Contract Company? A. There had been no road completed. Surveys were being made south of Denver, and a portion

of the grade had been made, when I was first connected with the road, but there wasn't much at that time. We were working between Denver and Colorado Springs. Q. At what time was your road completed to Pueblo by the Union
323 Contract Company? A. I only speak from recollection now. It was about the 15th of June, 1872. It didn't vary thirty days from that either way. Q. At what time was the road completed by the Union Contract Company from Pueblo to Labran? A. That was about the 1st of October, 1872. I am only speaking as nearly as I can recollect; don't vary thirty days, I think. Q. October, 1872? A. About the 1st of October, 1872, I think. Q. What is the distance from Labran to Cañon City? A.
324 It is about eight miles or eight miles and a half. Q. At what time was your road completed from Labran to Cañon City by the Union Contract Company? A. It was completed from Labran to Florence, about a mile or half mile beyond that, from there also to the Coal Banks to Cañon City. It was completed to Cañon City some time in July of '75; my recollection of that is indistinct, I can't say whether it was '74 or '75; but the
325 matter could be settled by Mr. McMurtrie's testimony; he was engineer. I think it was '75. Q. And that was nearly three years from the time you had completed to Labran; nearly three years afterwards. A. Yes; two years and a half. Q. Lacking from July to October of three years? A. Yes, sir. Q. How near was your road ever completed into Cañon City? A. Not knowing the limits of Cañon City, I can't answer that question; about three-quarters of a mile from the business part of it, is my judgment, without ever

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326 having measured it. Q. What time did you commence to construct, or did the Union Contract Company commence constructing the road from Pueblo through the Sangre de Cristo range of mountains. A. Didn't commence it from Pueblo; from Cucharas. Q. When did you commence building from Pueblo to Cucharas? A. Commenced there in the summer of 1873. We commenced building from there south; didn't go all the way to Cucharas at that time. Q. What time did you complete your road to Cucharas? A. It

327 was about the 1st of February, 1876. Q. What is the distance from Pueblo to Cucharas? A. Fifty miles. Q. How soon did you complete, or did the Union Contract Company complete the road from Cucharas through the Sangre de Cristo range? A. We reached the town of Garland about the 1st of August, 1877. Q. Where is Garland located, sir? A. It is within five miles of Fort Garland, in an easterly direction from Fort Garland. Q. What is that particular locality, or tract of country, that

328 is in known as. Is it known as the commencement of the San Luis Valley? A. No. The Sangre de Cristo Valley. Q. How near is it to the San Luis Valley? A. Well, if you explain just what you mean to cover by the San Luis Valley. I don't know that I can answer. Q. I may be under a misapprehension. I supposed that entire valley there, for a good many miles in length, was included? A. If you mean from the summit of the Sangre de Cristo range, westerly, to the sum-

329 mit of tne mountain, then it is the waters of the Las Animas, it is in what we know, more particularly as the Sangre de Cristo Valley. Q. What is the distance from Cucharas to Garland? A. It

about sixty miles. Q. When did the Union Central Company complete the road from Garland to Alamosa? A. It was some time in July of this year; the early part of July. I was trying to fix the exact date, but it slipped my memory. Q. In

330 In what direction, if any, are the Union Contract Company, now engaged in constructing a road from Alamosa? A. Southward. Q. Down the valley of the Rio Grande? A. Yes, sir. Q. In the San Luis Valley? A. Yes, sir. Q. What is that road called by the Denver & Rio Grande Company, and generally called; what is it called by your company and the Union Contract Company, that road running from Pueblo through the Sangre de Cristo to Alamosa and down? A. There is not any such road, that comprises two roads. Q. What is that line called? A. It is known gener-

331 ally as the Denver & Rio Grande Railway. Q. You say there is no such line as that known to the companies? A. There are two lines which comprise the lines you speak of. Q. I am asking you what that entire line of road is called, and has been called by the Denver & Rio Grande Company? A. Denver & Rio Grande, it is known that way. Q. Ohat has that road been called by the Denver & Rio Grande and Union Contract Compay, running from Denver to Cañon City? A. The Arkansas Valley Division. Q. Arkansas Val-

332 ley Division, or Branch? A. Division, it has been called, a Branch by the laborers on the road. Q. Has it ever been called so by the officers of your Company? Who has been President of your Company? A. General Palmer. Q. Has it ever been called so in any report by him? A. Not to my knowledge. I don't remember though. Q. State

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what the bonds issued by the Denver & Rio Grande Company upon that piece of road were called. What they were entitled upon their face. A. The
333 first mortgage, seven per cent. gold bonds of the Denver & Rio Grande Railway, Arkansas Valley Division. Q. Division or branch? A. Division. Q. You are certain of that? A. I speak from recollection, I am very positive about that. It is a matter that can be proved by referring to the mortgage. (Handed a pamphlet and asked, look at that pamphlet, the second Annual Report of the Directors of the Denver & Rio Grande Company to the stockholders, by whom is it signed. A. By General Palmer. Q. Look at page 9, at those words enclosed in brackets; state whether your company ever called that a branch? A. So it would appear from this report. Q. Was that report issued by your company and circulated to your stockholders, and circulated generally? A. It was. Q. I wish you would look at the map which accompanies and state whether that is a part of the report as made at that time? A. It appears to be; I can't say for certain, but I have no doubt it was; I don't re-
335 member it was with it, but I have no doubt it was. Defendants now offer in evidence certain portions of this report, the map and the report of the President, and particularly that part of it that occurs on page 9 in regard to the Arkansas Branch; also portions marked on pages 29 and 30. (No objection to that,) Q. For what purpose did your Union Contract Company attempt to enter into and occupy the Grand Cañon on the 19th of April?
236 A. To build a railroad. Q. Where? A. To the South Arkansas. Q. Where then to? A. I had

no instructions beyond that. Q. You were Treasurer of the company? A. Yes, sir. Q. Was that road that was intended to build at that time described in your certificate of incorporation as follows: "Thence up the valley of the Arkansas river to a point at or near Cañon City, thence continuing up the valley of the Arkansas through the Big Cañon of the same to a point at or near the mouth of the South Arkan-

337 sas river, thence by the valleys or the adjoining slopes of the South Arkansas river, and of the Poncho Creek to the summit of the divide, between the waters of the Arkansas and the San Luis Park, known as Poncho Pass; thence by the most eligible route in a general southerly direction down the San Luis valley to the valley of the Rio Grande Del Norte; thence in a general southerly direction by the particular route which may

338 be determined upon by a detailed survey, to be the most eligible down the valley of the Rio Grande to the southern boundary of Colorado; thence continuing down the valley of the Rio Grande on either side," etc.? A. The road I was instructed to engage in building was that portion of the description which you have read relating to the the line between the present depot of the Denver and Rio Grande railway at Cañon City, as far as the South Arhansas; beyond that I had no instructions. Q. Had you any knowledge of the

339 direction intended to be run from that point of this line you entered upon the Cañon for in April? A. I don't think I clearly understand. Do you mean had I any knowledge the company was going to build this line any farther? Q. Yes, sir;

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I ask you what knowledge you had, if any, of the intention of the compauies as to where they would run that road? A. No positive knowledge that that line would be extended any farther than that point. Q. Then it was not the intention of
340 either the Denver and Rio Grande Company or the Union Contract Company to continue that road through the Poncho Pass and down the San Luis valley to Mexico, was it? A. I don't know. Q. Don't know whether that was the intention of the company or not? A. I don't. Q. Do you not know whether it was the intention of the company to run that line down the Rio Grande to Alamosa? A. I Do not. Q. You don't know whether it was their intention to run through the Poncho Pass at all? A. From the South Arkan-
341 sas? I Don't know. Q. You say your road remained at Labran nearly three years before it was continued to Cañon City? A. Yes, sir. Q. On what conditions, if any, offered you by the people of Cañon City? Did you continue that road, the remaining eight miles, when it was continued? (Objected to, as immaterial.) Defendant proposed to show that they regarded the point at Labran as terminis; had no intention of building any further, and that the balance of it was almost entirely
342 built by Cañon City? A. The people of the town of Cañon City voted to the Denver & Rio Grande Railway Company, fifty thousand dollars in their town bonds, and the citizens of Cañon City donated lands, a certain amount of lands and town lots, it being understood at the time that the nominal value of the bonds and the lands was fifty thousand dollars, bonds and lands together, the face value of the bonds was fifty thousand. Q. The face

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value was the nominal value, was it not? A. The
343 Company agreed that if assistance to the extent of fifty thousand dollars was voted, that the line would be extended to within one mile of some point, I have forgotten—one mile of the McClure House—and it was agreed between the Company and the citizens of Cañon, that that fifty thousand dollars—it being understood that the bonds would only be valued by us at twenty-five thousand, and the lands twenty-five thousand—the bonds were actually fifty thousand on their face. It was
344 agreed that they should contribute the lands; the Company never recognized afterwards that they had fulfilled the agreement. Q. You got a quantity of lands? A. Lands and lots. Q. The consideration of those lands and bonds, was the extension of the road from Labran to Cañon City, eight miles? A. Substantially that; I think the stipulation was, the depot should be located within one mile of the McClure House; that is my recollection of it. Q. Who carried on the nego-
345 tioations on the part of the Denver & Rio Grande Company with the inhabitants of Cañon City in regard to that extension of eight miles? A. William S. Jackson partly, and I think entirely. He was then Treasurer of the Railway Company. Q. Was not part of it carried on by Mr. Palmer in person? A. Not to my knowledge. I think General Palmer at the time was in New York City. (Handed letter.) Q. Look at that letter and see in whose handwriting it is, and whose signature?
346 A. That is Mr. Jackson's handwriting, and the signature is General Palmer's. This portion here, the last part, commencing with, "in conclusion," is in General Palmer's handwriting, but the rest is Mr.

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Jackson's. Q. The whole letter is a letter of General Palmer's? A. Yes, sir, over his signature. (Handed another letter.) Q. Look at that and see whose that is? A. This is Mr. Jackson's handwriting and his signature. (Handed another letter.) A. That is Mr. Jackson's, also.

347 *Cross-examination of Robert F. Weitbrec*: Q. You say when you went up the Cañon the 19th day of April, for the purpose of building a road, your instructions only went so far as the mouth of the South Arkansas. You have not at this time, nor had you at that time any knowledge of the intention of your company as to its further operations in building a road? A. Not in that direction; I knew of other schemes in other points, but not there. Q. Your certificate of incorporation provides for a road from the South Arkansas
348 up the main Arkansas, as well as up the South Arkansas? (Objected to and question waived.) Q. You say you completed the road—your company did to Pueblo about the 15th of June, 1872? A. Yes, sir. Q. You then continued the construction of the road the same year and reached Labran or Florence sometime in October of the same year? A. Yes, sir. Q. And there rested until sometime in 1875, as your recollection is, when the road was completed to Cañon City? You were asked what consideration the company got for building its road to Cañnon City. You say they got fifty thousand dollars in bonds and a
449 sufficient quantity of land to make up the value of the bonds to fifty thousand dollars, as it was estimated? A. That was the theoretical value. Q. The bonds and the land together was considered to be about fifty thousand dollars at that

time? A. Yes. Q. Now you may state what the actual value of those bonds was, to you, or has been to your company? (Objected to; objection overruled.) A. The actual value of the two combined? Q. What has been the value of
350 the bonds to the company, first up to this time? A. The bonds were sold to the Central Colorado Improvement Company for twenty-five thousand dollars. Q. Well, now, what was the actual value at that time, the saleable value of the lands you got, if you know? A. We sold the lands to the Central Colorado Improvement Company for twenty-five thousand dollars. Q. You realized fifty thousand; what proportion was that amount, fifty thousand dollars, of the cost of building and equipping the road from Labran to Cañon City,
352 or from Florence? (Objected; the question should be confined to building.) *The Court*—I think it ought to be limited to building. A. The cost of constructing the road from Labran to Cañon City (I speak now from recollection of accounts of which I had charge,) was something over eighty thousand dollars. I will not be certain that there was not some equipment in that. It is usual for us whenever we build any railroad, to buy rolling stock for it, so I will not be certain that there was not something in that. Q.
353 You have been asked about the form of the mortgage bonds issued on this part of the road from Pueblo to Cañon. I forget what you stated the title of these bonds was, or the designation of the road of the company? A. Well, the substance of the title of the mortgage and of the bonds, too, is, speaks of seven per cent. first mortgage gold bonds of the Arkansas Valley Di-

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vision of the Denver and Rio Grande Railway Company, or Denver and Rio Grande railway—
354 that is substantially the title. Q. Now, under that designation, what does that mortgage cover—how far from Pueblo does it run—from what point to Pueblo? A. Well, I don't know; is not that a legal question? Perhaps I can answer that question by telling you the substance of the first preamble in the mortgage. It recites that, whereas, the Denver and Rio Grande Railway Company has authority under its certicate to build a railroad from Pueblo west to the vicinity of Cañon City, thence through the Big
355 Cañon of the Arkansas, thence continuing up the Arkansas to the mouth of the South Arkansas, thence continuing up the South Arkansas and Poncho Creek to Poncho Pass. That is the recitation first, and then there is another recitation in the mortgage, which refers to the entire thing as the Arkansas Division. I only speak from recollection now, and if there is any imperfection it can be verified by referring to the mortgage. I suppose it is a legal question whether the mortgage as it stands covers the uncompleted
356 part of the line or not. I am not prepared to say anything about that. Q. I thought possibly the mortgage might designate certain points from Pueblo, if you don't know about that. A. Only so far as I have explained in describing a road as a part. The subscription is substantially the same in regard to the Arkansas Valley Division as the certicate of incorporation calls for. It is proper to say that that preamble also recites with branches to the coal and iron mines near Cañon City, and in addition to that there was a company

organized entitled, as I remember, the Southern
357 Colorado Railway Company. (Objected to.) Q. What is the reason that the company stopped at Cañon City in 1875 or 1874, whichever year it was they completed to Cañon, and desisted from any further extension of the road westward at that time? (Objected to as not cross-examination.) *The Court*—I think it may be. A. The reason was on account of the depressed condition of business, which made it very difficult, if not abso-
358 lutely impossible, to raise money for the purpose of building railroads, especially in the West. Q. You completed your road from Pueblo to Cucharas in 1876, did you? A. Yes, sir. Q. And in 1877 from Cucharas to Garland? A. Yes, sir. Well, we built a portion of that, as far as La Veta, in 1876, and then finished up in 1877 to Garland. Q. Will you explain why it was that you constructed in that direction after 1874, rather than through the Big Cañon? A. Because, in the opinion of the directors and stockholders, the
359 construction of that portion of our railroad system held out the greatest promise of immediate results. Q. For the same outlay of money, it was the opinion of the company that they could reap returns more rapidly? A. Yes, sir. Well, for a less outlay of money. Q. And therefore you expended money at that time on that route, and left the Cañon route unoccupied. A. Yes, sir.

Re-examination of R. F. Weitbrec: Q. You
360 stated something in regard to what those bonds or mortgage contained. Was there a provision in those bonds that they were convertible into main line stock or stock of the main line, or main line bonds? A. I have no recollection on that

subject. Q. Do you say t'ere was not a provision in them that they should be convertible into bonds or stock of the main line? A. I don't
361 say anything about it, because I don't remember.

William H. Greenwood, sworn: Q. State to the court what position, if any, you held in the Denver and Rio Grande or Union Contract Company in former years, and when that relation commenced and when it ended. A. It is very hard to tell when it commenced, as it was principally done by conversation between myself and Gen. Palmer, for probably a year before there was any final settlement. Q. State when your actual duties commenced. A. My memory serves me it was about the 1st of November, from the 1st to the 15th of November, 1870. Q. What was that
362 position? A. It was generally recognized as that of General Manager. I am not certain as to the date, but I think I left the Kansas Pacific in November, and I commenced at the same time. I remained with them until about July, 1874. My memory serves me the final settlement was not made until away in 1875. Q. In whose employ were you during that time? A. The Union Contract Company paid me for my services. Q. What was that Union Contract Company? A. It was a company organized, I believe, under the direction or permission of the Legislature of
363 Pennsylvania. Q. For what purpose? A. For constructing railroads. Q. State how they were connected with the Denver and Kio Grande Railway, if there was any connection. A. There was a co.tract between the two companies, under which the Union Contract Company was to construct the road for the Denver and Rio Grande.

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Q. To construct it? A. Yes, sir; construct, equip, and perform all the necessary— Q. Which company would acquire the right of way necessary. A. I don't think that question was ever canvassed particularly; either company did whatever they thought they could. Whenever a legal
364 question came up, it was referred to the attorneys of the road for their direction and advise. Q. State whether or not you were connected with that road and in charge of it under the Union Contract Company in January and February, '71. A. I think I was. Q. State whether the survey testified to as having been made through the Grand Cañon and up above there was made under your and management. A. My memory does not serve me as to whether I gave the directions directly to Mr. McMurtrie, or whether I gave them to Mersereau. Q. Who was acting as Chief
365 Engineer? A. Under my general control. Q. What was the object of that survey at that time? A. The object was to retain control of the Cañon for the Denver & Rio Grande Railway Comp'y. Q. For what particular road. A. It was for the Denver & Rio Grande Railway Comp'y. That was the interest which the Union Contract Company was connected with. Q. The Denver & Rio Grande had in contemplation the construction of several lines? A. The intention was to construct all the lines they could get money to build as fast as they could get it. Q. When you speak of the Denver & Rio Grande, what road do you mean to desig-
366 nate by that name? A. The original intention was to build from Denver to Pueblo, thence up the Arkansas River through the Poncho Pass, south to El Paso. Q. Was that the intention at

the time you are speaking of? A. That was my impression from my conversation with General Palmer. Q. In your office; from your knowledge of the affairs? A. The different questions were all canvassed at the same time as to what was the best route, and my advice was to take that route. Q. Do you know of any work having been done in the Grand Cañon or in the vicinity of the Royal
366 Gorge? A. I was told that there was. Q. Did you, as Manager, of that Company, know for what purpose that work was done. (Objected to as leading.) *The Court*—It does not suggest the answer to be given. Objection overruled. A. I was of the impression I did; although General Palmer had authority to counteract anything I could do or say. Q. State what was the purpose; intention? A. The intention was to do work enough to keep the right of way through the Cañon, if they could, as we were afraid some other parties might enter in there and trouble in the construction. Q. At the time that work was done
367 in that Cañon, was there any intention on the part of the Denver & Rio Grande Company, or Union Contract Company to construct a road in that vicinity immediately or soon. (Objected to, as leading and suggestive.) Objection overruled. A. They could not have constructed, as there was no money raised for that purpose at that time. The policy of the Company shows their intention in the organization (of Pools) for building. Q. Could a road have been constructed at that time from that end? A. Of course it could. It would have required to construct from that end first, to
368 commence construction and then haul the iron up there, and then haul your iron back. Q. At what

time, if at any time, was that route abandoned by the Denver & Rio Grande Company for its main line, and the other route selected? A. I could not answer the question, as I did not have any conversation with the parties with regard to it. Q. When did you first know that that route was abandoned as the route of the main line? (Objected to, as assuming that he knows something he does not.) Said objection sustained. Q. When,
369 if ever, did you first become aware that that route had been abandoned, for the construction of the main line? A. The word abandon is one that I should not be able to answer the question. I learned that they had commenced grading whilst in Mexico, through correspondence. Q. You learned while you was in Mexico? A. That was in the summer and spring of 1873. Q. What do you mean when you say, you learned that they had commenced grading? A. That they had commenced preparing the road-bed for ties. Q. On a dif-
370 ferent line or on this line? A. On the road south from Pueblo. Q. You may state if you ever had any conversations with Gen. Palmer or other officers of the company in regard to the change of route of that road, and if so, with what officer, and at what time? A. I had conversation with Gen. Parmer in regard to it. Q. At what time? A. It would be impossible for me to answer, as those questions were canvassed for several years. Q. Was it previous or subsequent to commencement of the building of the main line from Pu-
371 eblo south? A. I should say that I conversed with him both before and after in regard to it. Q. You may state what, if any, reasons Gen. Palmer

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in those conversations gave you for changing the line and adopting the other route for the main line of the road? A. My impressions of conversations were that if we left the short line open from Pueblo to the San Luis valley, and went by another route, some other road might come up and occupy the shorter route, and in that way throw them out of their business by a shorter
372 route. It was my impression of the conversation at all times. Q. Please not state your impressions; state what Gen. Palmer said? A. It would be impossible for me to state the conversation. Q. State the result of it—the substance of it? A. I have stated the substance as near as I can. As I stated before, the substance was by leaving the short line open it would injure the company. Q. When was the first time that Gen. Palmer made those suggestions to you, or used that argument
373 in favor of the other route for the main line? A. I could not tell. I think the subject was canvassed even before there was anything done or the company organized. Q. Were you in the employment of either the Union Contract Company or the Denver and Rio Grande Railway Company at the time of the building of the branch road from Pueblo to Labran? A. Yes, sir. I was in the same position that I had held from the first. Q. State, if you know, how that road was designated by the company? A. I could not tell what
374 the actual words, lawfully, would be. I always understood it as branch in all our conversations. I think we used the word *branch*, though I think the word "division" was in many of the recorded papers. Q. How was it spoken of and regarded

by the officers of the company? A. I can only give my impression in regard to that; the bonds show that on the face of them—show that it was. Q. How were they designated there? A. I could not tell. I have read the bonds; for me to at-
374 tempt to designate words from my memory would be useless. Q. State whether there was a provision in these branch bonds for conversion into the bonds or stock of the main line? A. I think there was some such provision—that was my impression, but unless I could take a bond and read it, I could not testify under oath. Q. What position, if any, do you occupy now, and under what company, if any? A. I am acting as Assistant Engineer in the construction of the line from Cañon City to the Forks
375 of the Arkansas. Q. In the employ of what company? A. Designated partially as Cañon City and San Juan, and partially as Pueblo and Arkansas Valley. Q. Are you familiar with the Grand Cañon of the Arkansas? A. Reasonably so. Q. State whether or not through the Grand Cañon of the Arkansas, at any point, there is not room for two roads. A. There is room for two roads through the entire length, one on each side of the river. Q. What would be the difference in the
376 cost of construction? A. The cost of construction would depend a great deal upon the maximum grades and the degree of curvature adopted by the corporation intending to build. Q. Well, if built on the most economical plan for the construction of a good road, what would be the difference in the two lines? A. I should rather not answer the question, as it becomes a question of opinion of engineers; and if a person would give

me the degree of curvatures and the grades, then
377 I could answer the question reasonably; the other is a matter of opinion of engineers. It would cost a great deal more to build on the south side than the north side, and to build cheaply the curves would have to be heavier—sharper. Q. Have you seen lately the work performed under the Union Contract Company in the Cañon in the year 1871 or 1872, whenever it was done? A. I have seen work that was done there where they say work was done. Q. What is the extent of
378 that work? A. There are several retaining walls built there; grading,—could tell but very little about it, as there was work done since that, and I could not designate between the two. Q. I am speaking of old work. A. There was work afterwards done on the same ground, before I saw it, so I could not tell anything farther than the retaining wall. The retaining walls were not laid during the excitement in April or May. This work was done since April or May in the vicinity
369 of the same ground, passing over the same ground, so I could not tell what was done before. Q. You were not in the employ of the Union Contract Company or the Denver and Rio Grande at the time the road was extended from Labran to Cañon City, were you? A. I was still drawing a salary from the Union Contract Company, but I didn't take personal charge of the work, as I had been absent for some time. Q. How long had you been absent at that time? A. About two years. Q. Did you know anything of the negoti-
380 ations between the inhabitants of Cañon City and the Company in regard to that extension? A. Only as I received it by letters from different par-

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ties. Q. From the officers of the Union Contract Company, or of the Rio Grande Railway Company. A. No, sir; from private individuals, and from the newspapers—I think I learned it mostly from the newspapers. Q. How long did you remain in Colorado after the road was completed to Labran? A. I remained until December; the road was completed in the last of June, or the first of July. Q. Was it or was it not the intention of
381 the Union Contract Company, or the Denver & Rio Grande Company, to proceed at that time immediately in the construction of its main line through the Grand Cañon and Poncho Pass? (Objected to, as leading. Objection withdrawn.) A. I don't think they intended to. Q. State what, if any thing you know, from your official position, and conversation with the officers of the Denver & Rio Grande Company in regard to that; Labran being considered the final terminus of the road,
387 or the coal banks being the final terminus of the road at the time you left? A. I do not think they considered it a final terminus; the whole intention was to build on whenever they could get means. Q. To build on? Where? A. Whereever they thought it would pay to build. Q. I was asking you in regard to the construction of the main line in that direction. From your official position and knowledge of affairs, and relation to the officers of that Company, can you state whether or not it was the intention of the
383 Denver & Rio Grande Company, at any time, to continue its main line in that direction? (Objected to, as leading.) *The Court*—You seem to place a stress upon the upon the meaning of words; you put an emphasis upon *main line*. I don't

think you can make any distinction in your questions; at all events, you must ask him whether they intend to build a road, and it is for other authority to determine what sort of road it is. (Question withdrawn.)

384 *Cross-examination of William H. Greenwood:* Q. You say you are now engaged in some capacity. I didn't hear you state what it was? A. With the Cañon City and San Juan Company, and the Pueblo and Arkansas valley Company. Q. State what that position is? A. As an engineer; I have charge of the construction. Q. How long have you had charge of this construction? A. I think I reported for duty on the eighth or ninth of May. Q. Where had you been living immediately preceding your employment in this capa-

385 city? A. For several years I had been stopping in the State of Vermont, County of Windham, town of Denniston. Q. Were you employed to come out and take charge of this work before you left Vermont or afterwards? A. I was never employed until after I had been here several days. Q. Did you have any negotiations with any person about coming out here and taking some employment in this capacity? (Objected to.) *Plaintiff*—I want to show who

386 employed him. *The Court*—I don't think it makes any very great difference. *Plaintiff's Counsel*—I want to show the company, if I can. (Objection overruled.) A. I had not in that capacity. I would answer as engineer in charge of construction. Q. I will ask you plainly whether or not you had not some correspondence or negotiation with some person or some company about coming out here and going into the construction of

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this road before you left Vermont? A. No, sir. Q. Did you before you reached this country? A. I had correspondence in regard to other roads.

387 *The Court*—That will do. Q. Who employed you to take charge of this construction? A. Mr. Robinson. Q. What office does Mr. Robinson hold in any company that you know of? A. I understand that he is Chief Engineer of the Cañon City and San Juan Railroad Company. Q. To whom do you look for your pay? A. I settle my accounts with Mr. Robinson. Q. You say you are in the employment of the Cañon City and San Juan company, and the Pueblo and Ar-

388 kansas Valley company, how are you in the employment of the Pueblo and Arkansas Valley company in the construction of that road? A. I cannot answer the question; I am ordered to settle accoudts in a way that leads me to that conclusion. Q. Will you please state how you settle these accounts; perhaps the Court then can find out? A. Directed by the Court, I should have to answer the question. *The Court*—Answer unless there is objection, Mr. Greenwood. (Defendant objects to his stating that he has already shown.) (Objeetion overruled.) A. Accounts for the first twenty miles, all expenses are accounted for for the Cañon City and San Juan; beyond that they are for the Pueblo and Arkansas Valley. Q. Do you know from any information you have derived from the officers of the Cañon City and San Juan company, or from your own personal knowledge, where the means come from that is building this twenty miles for the Cañon City and San Juan company? (Objected

399 to—not cross-examination. Objection sustained.)

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Q. You were one of the original incorporators of this company—you, Gen. Palmer and A. C. Hunt? A. Yes, sir. Q. Afterwards you became General Manager of the Denver and Rio Grande railroad? A. General Manager for the Union Contract Company. Q. And who was General Manager of the railroad at that time? A. It was generally considered that the two were one and the same thing, except that the pay all came from the Union Contract Company.

391 Q. Being one and the same thing, when you were General Manager of the Union Contract Company, you were General Manager of the Denver and Rio Grande Railroad? A. My arrangements were that I was to have nothing to do with the operating department of the road, unless there was some quarrel came up between the constructing and operating departments, in which case I could give the necessary orders to make it economical for the two companies. Q. As General Manager

392 of the Union Contract Company, you had charge of surveys, had you not, and had certain control of them? A. Probably more as a Consulting Engineer than anything else. Q. You know of a survey being made through the Grand Cañon in 1871, do you not? A. I know there was one made. Q. Plats were returned to you, were they not? A. I think not. An estimate was returned: the plats, I think, were in the office, and I examined them in the Engineer's office. Q. Returned them to the Chief Engineer? A. I think so. Q.

393 You said in your direct examination that you gave some orders concerning it to Mersereau, and perhaps to McMurtrie. A. I said I didn't know which I gave the orders to. Q. You had a

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certain control over that survey, and a certain connection with it, did you not? A. I supposed I had. Q. Suppose so now, don't you? A. Yes. Q. You knew then, at the time the survey was made. Did you order that work in the Cañon?
394 A. I think I did. I don't think the work would have been done if I hadn't ordered it; but to go back to any small thing like that and tax my memory, it is an utter impossibility. Q. The orders that you gave concerning that were in the line of your duty and authority in the company, were they not? A. The general interests of the companies. Q. And in the line of your duty and authority concerning the work? Did you see the work at that time, after it was finished? Did you ever go to look at it? A. No, sir. When did you first see it? A. I could not give the date;
395 since I commenced with the Cañon City and San Juan Company. Q. Some time within the last two or three months? Have you been over the line the entire length of the Cañon since the 19th of April? A. I have been over the entire line, except such points as were triangulated past. Q. Who paid for this work done in this Cañon in 1871? A. I suppose the Union Contract Company. Q. You have been over the line of your company's survey, I mean the Cañon City and San Juan Company, except, you say, those points
396 where you have to triangulate? A. Yes, sir. Q. How close does this line run to this work done in 1871? A. It runs very close to the retaining walls. Q. That is the center line? A. Yes, sir; I don't recollect how far, of course. Q. How far below the road-bed of the line already constructed is the center line of this survey of the Cañon City and

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San Juan Company? A. The center line can not be below the grade line; cannot be below the work done in that place, as it is on a rocky ledge plateau. Q. Does your Cañon City and San Juan
397 line run on that work? A. No, sir; the center line does not; it runs nearer the river. Q. Runs to the left of it going up the river? A. Yes, sir. Q. Is it equally as high as this work is done? A. the centre line, as we call it, is the centre line, no matter how high it is; passes over the point where the line is supposed to be constructed, whether it is one hundred feet above or one hundred feet below. Q. When your work is constructed on that line, if it should be on the line now surveyed, will your road-bed be as high as this road-bed which has been already constructed?
398 A. No, sir, if the height of those walls was the height of their grade line. Q. What is the difference—how much will it be? A. It is in the neighborhood of fifteen or twenty feet; I have not measured it; of course I could not tell. Q. How high above the water, the river, is your line run, if that be constructed? (Objected to—not cross-examination. Our own witnesses testify we take a part of that original grade. We don't deny it.
399 Objection sustained.) Q. On direct examination you say in answer to this question, "Who employed you in '71 and '72, when you were emploped by the Denver and Rio Grande company?" Your answer is, the Union Contract Company paid me. Now, I want to know who employed you? A. Perhaps I had as much to do with employ ng myself as anybody; it was by general conversation with Gen. Palmer, myself and the other parties—Gov. Hunt was one. Q. They

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were no part of the Union Contract Company? A. Not at the time. Q. Then you were employed
400 actually by the Denver and Rio Grande Company, were you not? A. At the time I commenced with them the Denver and Rio Grande Company, I think, was not organized; I am not positive; all this conversation was in what was called the organization of the corporation. Q. And you continued in the employment of that Contract Company in way you have already specified? A. There was a special arrangement made after that, after we had decided to build the Denver and Rio Grande, and after the Union Contract Company was organized—an agreement between Gen. Palmer and myself. Q. Gen. Palmer was
401 the President of the Denver and Rio Grande Company? A. Yes, sir. Q. You say this work was done in this Cañon for the purpose of holding this Cañon for the Denver and Rio Grande Company to prevent other companies from going in and absorbing it? A. Yes, sir. Q. The survey was made for the purpose of holding it? A. Yes, sir; the survey was. Q. And the work was done for the same purpose? A. Yes, sir. Q. You say at that time there could not have been a road built because they had not raised the money for that purpose?
402. A. In the general acceptance of the term. Q. You were asked when this road was abandoned; you answered you could not say it never had been abandoned? A. The word "abandoned" is so broad that I could not swear to any facts in regard to it; that they went south is a self-evident fact and they called it the main line. Q. You have no knowledge that

they have ever abandoned that road at all, in the broad sense of the word abandon? A. I presume if they could get money they would build, but not on the original line; I presume not on the
403 original filing. Q. What do you mean by the original filing? A. Through the Poncho Pass. Q. But they go through the Cañon, don't they, on the original filing? A. If they build up the Arkansas River they would be very foolish if they didn't build through the Arkansas Cañon. Q. Is it possible for them to build up the Cañon from Cañon City, without going throug the Cañon? A. Not up the Arkansas River; they can build in the immediate vicinity, in what is called the
404 Arkansas country. Q. You say it is a self-evident fact that they built south and they called it the main line; you say Palmer's explanation of using that route first, was it was a short route, and some other company might get it? A. Yes, sir. Q. Did he at any time and in any of these conversations relating to his building on that route,, say anything to you to the effect that he had given up this Arkansas Cañon route, except for the time being? A. I can only give my impressions from the conversation, the conversation I cannot give, my memory is not sufficient to rec-
405 ollect such. Q. What you have stated about his conversation regarding the building of his road from Pueblo southward, is only an impression; is it not; you don't pretend to give his words? A. I don't. Q. But it is your impression that that was what he meant? A. Yes, sir. Q. I will ask you if you don't know, that the reasons influencing the Company in building southward from Pueblo in '74, was not because it was difficult to

raise money, and it was cheaper to build a given number of miles in that direction than it was to build up through the Grand Cañon? A. I don't
406 think that was the idea, not the general idea as canvassed by General Palmer and myself. Q. From what you knew as an officer of the Company and from what you obtained as information from the other officers of the Company, General Palmer included, do you not know that if they had had sufficient money to enable them to do so they would have pushed both roads at the same time? A. I presume they would; simply a presumption though. I don't know. Q. You
497 may state if it is not much cheaper to build from Pueblo to Cucharas, fifty odd miles, than it would be to build the same distance up the Cañon? A. Cheaper; of course. Q. Would it not cost less to build from Pueblo to El Moro, than it would from Cañon City to the mouth of the South Arkansas? A. That is simply matter of opinion of engineers. I could not answer the question correctly. Q. You are an engineer; are you not able to give an opinion on that? A. Unless the Court directs, I should rather not give it. Q. You were asked about the form of those bonds, and there being permission—in the bonds to
408 change them for stock—in the main line of the road. Those bonds were executed in 1872; were they not? A. I could not tell the time. Q. Were they not executed before the construction of the road from Pueblo to Labran? A. I think they were. Q. Were they not executed in order to secure the money which had been raised for the construction of that work? A. I think they were. Perhaps not so much to secure the money as to

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secure the Central Colorado Improvement Com-
409 pany. Q. Now, at that time, there was no line constructed except from Denver to Pueblo; was there? A. No, sir. Q. There was no line south of Pueblo completed at all? A. No, sir. Q. There was no grading done even, at that time? A. No, sir; not to my knowledge. Q. Then, as a matter of course, that was the main line; was it not. It was the only line they had? A. It was the only line. Q. Then it must have been the main one. At that time had there been any surveys made south of Pueblo, by your Company?
410 A. The country had been examined; I had examined the country years before; the whole country. Q. Examined it before that time for the Kansas Pacific. Hadn't you? A. Yes, sir. Q. You say that it was generally called the road from Pueblo to Labran, was usually called branch. Do you not know that in all the documents and records relating to this piece of road, it was described as a division? A. If the question had been asked me before Weitbrec's evidence, I should
411 have said *branch*. I presume from his evidence, having the papers and all that, recited the word division, and I presume that is the word used. Q. You say there is room for two roads in the Cañon, but you cant't pretend to give any opinion as to the difference in the cost of construction on the two routes? A. I said I would rather not. I could give an opinion, of course.

Re-examination of William H. Greenwood: Q. You say in answer to my question, in speaking o the two routes, if they had had money they would have probably built both roads at the same time.
412 What do you mean by that? A. That they

would have built both roads, one through the Veta Pass into the San Luis Valley, and the other down into old Mexico. Q. And the other through the Poncho Pass to some place? A. I didn't intend to convey that. I think the questions were in regard to building up the Cañon, regardless of Poncho Pass. Q. You didn't intend to be understood up through the Cañon and down through the San Luis Valley? A. I don't think they would build both roads in that direction. Q.
413 They had already made their choice of the route for the road at the time you speak of? A. They had decided, as I understood it, to build south then. Q. The main line south? A. In this same conversation which I had with Gen. Palmer it was left an open question. Q. You speak of bonds being issued to secure the Colorado Central Improvement Company; what is that? A. It is a company organized under the laws of the
414 Territory. Q. For what purpose? A. To raise means to buy lands, and to build two lines of road. Q. What lines? A. To build from Pueblo to the coal banks and Cañon City, and also twenty miles down the Arkansas River. Q. From what point; from Pueblo down? A. Yes, sir. Q. Was this road you speak of, from Pueblo to Cañon City, built by the Colorado Central Improvement Company? A. No, sir. Q. Did they furnish the means to build it? A. That was my understanding, that they did furnish the means, and received a million and forty thousand in bonds for the construction. Q. That road was
415 not constructed by the Contract Company? A. Constructed by the Union Contract Company, with the funds of the Colorado Central Improve-

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ment Company. (Objected to as not re examination.)

Townshend S. Brandegee, sworn: Q. What is your business or profession? A. Civil engineer. Q. State where you are employed, if anywhere at present, and by whom? A. I have been working up the Cañon of the Arkansas, in one of Mr. Robinson's engineering parties. Q. State under
416 what circumstances you first knew the Grand Cañon of the Arkansas. A. I have been through there on the ice as far back as 1872—'71. Q. Seventy-one and two? A. Yes, sir. Q. Under what circumstances, and with whom, if anybody? A. I just went through on the ice to go through. I don't know who was with me. Q. State whether you were ever connected with the survey of that Cañon. A. I was with Mr. Holbrook, in February, 1877, I think. Q. Go on and state how
417 you made the survey, what was done, and for what company it was made. A. It was made for the Cañon City and San Juan Company, and we run a line all through the Cañon, putting stakes every fifty feet, and putting the curvature in on the ground, except in the Royal Gorge, where it could not very well be done. Q. You may state what kind of a survey you made through the Royal Gorge. A. It was an angle line through there, with stakes wherever they could be set—that is, upon the rocks—and the rest of the way it was upon the ice. Q. State whether it was a
418 correct and accurate survey. A. Yes, sir. Q. For the location of a road? A. Yes, sir; as good as could be made. Q. State whether or not that survey was sufficiently complete to draft a plat and profile of a road. A. Yes, sir, it was.

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Q. You may give the date of that, as near as you can, the date of that survey. A. It was in the latter part of February, 1877, I think. Q. State whether or not the Grand Cañon of the Arkansas at that time was in the public lands of the United
419 States. A. Yes, sir. (Objected to; not a question to be proved by parol. *The Court*—My impression is, it is conceded by both parties; I don't see why it should be questioned here.) Q. State whether or not that location was made to conform to the lines of the public survey. A. Well, it was, as near as could be at that time. Q. What was the condition of the public survey at that time? A. The exteriors of that township were run, but the sub-division lines had not been run.
420 Q. State whether or not it was properly connected with the exterior lines. A. Yes, sir. Q. State if you know whether or not that township has been sectionized since. A. The section lines or sub-divisional lines were run last November and December. Q. State if you know who did it. A. I did it. Q. State if you know whether the plat or map of that road is correct in regard to the exterior lines of that township and the sub-division lines? (Objected to as leading; objection overruled.) A. Well, the sub-divisional lines were not run at the time of
421 the survey, but it was connected with the corners, and the exterior lines correctly. Q. I will ask you if you have ever seen any old work in the upper part of the Cañon or at any point in the Cañon? A. Yes; we saw a few old stakes along through the Cañon, and some grading done. Q. Where did you see stakes—how many? A. At different points along through the Cañon—half a

dozen or more—not very many. Q. You say you
422 saw grading just above what is known as the Royal Gorge—what was its extent? A. About two or three hundred feet long and across some small gulches that were filled up, so that this two hundred feet was on a grade of some sort. Q. Do you know who did the work? A. Only by hearsay; I didn't see it done. Q. State whether you assisted in preparing a plat and profile of that railroad route? A. Only in drawing it; I assisted in making out the notes and calculations, and so on. Q. Who made the map? A. Mr. Holbrook.
423 Q. In your presence? A. I saw him making it; he used some of my instruments in making it. Q. State whether or not it is a correct map? A. Yes, sir; I suppose so; it was made from the notes. Q. Were you familiar with the Grand Cañon? A. Yes, sir. Q. Through its entire length? A. Yes, sir. Q. State whether or not there is room at all points in that Cañon and the Royal Gorge for the construction of two lines of railway? A. Yes, sir. Q. If you have made any calculation
424 in regard to the comparative cost or the difference in cost of construction? A. No, sir. Q. You could not give any definite idea of the difference? A. No, sir. Q. Look at that map (exhibit;) state whether that is the map you referred to in your testimony? A. Yes, sir; it looks like it. Q. Examine and see if it is? A. Yes, sir. Q. State whether that map is properly connected with the exterior lines of the township? A. Yes, sir. Q. State what those dotted lines show within the township? A. Those represent where the sec-
425 tion lines would probably come when it shall be sub-divided. Q. Are those correctly put on? A.

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Yes, sir; that is as far as the drawing is concerned on the plat.

Cross-Examination of Brandegee: Q. Can you fix with any certainty the day of the commencement of your survey with Holbrook? A. It was in February, and I think near the end of February; I don't remember the date. Q. Have nothing by which you can fix the exact date? A.
426 No, sir. Q. How long were you engaged in making that survey? A. Well, it was about two months. Q. How farup did you go? A. We meant to go twenty miles from Cañon City; I think we went about twenty miles from the depot; have no recollection, though. Q. You say in going along you found some stakes, a half dozen; did you run your line on those half dozen; did your line coincide with those stakes where you found them? A. Well, we happen to see them—not exactly—no, sir; could not tell very well
427 where the line did go from a single stake; it was probably one side or the other of them. Q. When you got into the Royal Gorge, where did you put your stakes there? A. They were put up on the rocks wherever they could be—that is a very small part of the gorge. Q. What proportion of the gorge could you find place to stick stakes? A. I don't remember as to that, certainly. Q. The other stakes were stuck in the ice? A. Some of them put in the ice—yes, sir; in some
428 places the walls were perpendicular; in such places they were always put in the ice. Q. Did you find stakes in the Royal Gorge that had been stuck there before? A. No, sir; didn't see one. Q. In making your survey did you see where any work had been done? A.

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Yes, sir. Q. Is your line run below or above that work? A. I know stakes were stuck on the grade at that time, on that grading; that is, Mr. Holbrook's. (Question by defendant's counsel: You mean the original survey?) A.
129 Stakes were put on that; the grading would cover eight or ten feet in places, perhaps. Q. How much above the water is that work? A. Forty or fifty feet; some where along there. Q. Your stakes, a good many of them, were set down on the river on the ice? A. No; they were up on the grading at that point. Q. Some of them were set on the ice? A. Yes, sir. Q. They must have been some forty feet below your line; were they not? A. No, sir; probably not more than ten or fifteen feet—the grade line, you mean. Q. Yes. If you construct your railroad on the
430 line you then surved, how much above the stakes that you set in the ice, will your line be? A. Well, of course, it would vary in different places; it would make a difference where the grade was established from those stakes; those stakes were used in locating the line. Q. How far generally above? A. That is done on the profile, generally from ten to fifteen feet above high water. Q. How much above low water? A. It would not be more than four feet generally above high water, ten or
431 fifteen above low water, perhaps. Q. You set your stakes on the ice, you say, because you could not find any place, any earth to set them. Is there any place along that cañon and that gorge, where you can find earth enough to set a stake? A. Yes, sir. Q. Could you find it anywhere through the cañon within a hundred feet of another stake, a place to set a stake? A. No, sir.

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I think there are places that it can be done for some distance. Q. Now, failing to find earth to put your stakes in, could you not, just as well as not, set
432 your stakes and held them in place by loose rocks? (Objected to.) A. Not on perpendicular rocks. Q. How much of that sixty-six hundred feet in the Royal Gorge is perpendicular rock, you could not find a place to fasten a stake? A. I don't know how much of it is. Q. For whom were you making this survey? A. Well; I understood at the time that it was the Cañon City and San Juan Company; that was common talk amongst us there on the survey. Q. Who paid
433 you? A. Well; I was paid directly from Mr. Holbrook. Q. Money? A. Check on the bank, and I think signed a pay-roll that was headed Cañon City and San Juan Railway Company. I am pretty certain of it; I am not positive. Q. About what time did you get your pay? (Objected to.) Q. As to this map, are the sub-divisional lines, as you call them, connected with your survey on that map? A. They could not have been, because the survey was made before the sub-divisional lines. Q. It has never been done since? A, I don't know. Q. Unless you have sub-divis-
434 ional lines at the time you make a survey of this kind, is it possible to make an accurate survey and plat, so that when you come to complete the work, the line, you can find where they come? A. You can do it as well as you can at that time; you can't connect it with the lines, because the lines aren't there. Q. Without you have the lines, then, can you depend on the certainty of your
435 survey? A. The survey is all right; it doesn't make any difference with the survey—the lines.

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Q. Does it make any difference with the work? A. It doesn't make any difference with the work, as I see. Q. Are you assisting in the construction of this work now? A. I am up in the cañon at present; have been. Q. On the engineer corps? A. Yes, sir. Q. How did you find that the line you surveyed and platted agrees with the line the company is now pursuing in constructing this work? A. I have only been on that part from Cañon City to the Grand Cañon. Q. You know nothing about it inside of the cañon? A. No,
436 sir; I have not been inside of the cañon, that is, the gorge, this summer. Q. Since you have subdivided those sections, are your lines on that map the same with reference to those sub divisional lines that they were before you made the survey of the section? A. I could not tell without running it on the ground. Q. That you never did? A. No, sir. Q. You don't know how they agree when you come to make a plat of them? A. No, sir; of course not. Q. Isn't it true that in the survey of government land, sub-dividing the sections for land-office purposes, the surveyor is allowed a certain number of feet to go on, so that one of these quarter sections which you have platted here may fall in another without making a portion of that survey? (Objected to, and objection sustained.) *The Court*—You may ask him whether the lines fall in a particular place according to the exterior lines,—whether they must of necessity; what he is allowed in the Land Office has nothing to do with it. Q. That plat is made
438 before a survey, and they are merely imaginary lines, are they not? A. They represent where lines would probably come; they are approxi-

mate lines. Q. When you come to make a survey for the government for land-office purposes, the lines you may run as a surveyor may not agree with those lines, may they? (Objected to; objection overruled.) A. They would differ very little; they would not probably be exactly that. Q. What do you mean by very little—a few feet? A. They ought not to more than that; take the
439 whole township through, it would not amount to anything. Where it is excess on one mile, it would be deficiency on another. It is very little; that is corrected on the next mile. Q. That don't correct the deficiency as to the deficient quarter section. A. Well, of course, it is very little on each mile; it is averaged through. Q. That is, if it is averaged. A. The error allowed is about sixty feet; generally it is very much less than that. Q. Don't it very frequently occur in government surveys that a township is four to six hundred feet shorter than it ought to be? A. Well, if it
440 is noted in the notes, that would show on the plat. Q. Doesn't it occur very frequently? (Objected to.) A. No, sir.

Re-examination of Brandegee: Q. State whether that township had ever been sub-divided prior to last year. A. No, sir. Q. It was not sub-divided in '71 and '72? A. No, sir. Q. I understood you to say on your direct examination that those dotted lines, section lines, were only put there as suppositious lines, where it was supposed they would occur. A. Yes, sir. Q. Would the variation
441 of the sectional lines of the actual survey from those suppositious lines in any way affect the location of your road in the Grand Cañon? A. No, sir. Q. Now, in regard to the stakes on the

ice there. State whether or not stakes set up on the ice would or would not be as correct a location as it would the same distance if the line were on the precipice? A. Yes, sir; it would be just as efficient for making the location. Q. State
442 whether that location was a correct location. A. I suppose it was; yes, sir.

Charles E. Gast, Esq., sworn: Q. You may state what your business or profession is. A. Practicing attorney. Q. State if you know the Cañon City and San Juan Railway Company. A. I do. Q. State if you have had any official connection with it. A. As the attorney of the Cañon City and San Juan Company, I have procured by the Secretary of Interior the approval of that plat of right of way (Exhibit No. 1); that I under-
443 stand to be a copy of it. Q. State what you did. A. The map was furnished to me by Chief Engineer Robinson; by Mr. Holbrook, I should say. I had prepared at that time a certified copy of the articles of incorporation of the company; also a certified copy of the general incorporation act under which the company was incorporated, and the certificate by the president of the company as to the organization, who the officers were,—which are the proofs required to be made by act of Congress and the regulations of the Land Depart-
444 ment; filed the plat, together with the proofs, with the Register and Receiver of the local Land Office at Pueblo, and they transmitted the same in the usual course of business to the Commissioner of the General Land Office. Q. State what evidence you had, if any, of its having reached the Secretary of the Interior. A. Some months afterwards I was notified by the— (Ob-

jected to, not competent; objection sustained.)

445 *The Court*—Plat recorded in office of Secretary may be transcribed, and that by act of Congress is evidence of record.

Verbal agreement of attorneys spoken of, etc.

Aaron A. Robinson, sworn: Q. What is your business? A. Civil engineer. Q. By whom are you employed at the present time? A. Employed by the Cañon City and San Juan Railway, one corporation. Q. In what are that company engaged, if anything? A. Engaged at the present time in the construciion of a road westward from

446 Cañon City. State whether or not they are constructing a road in what is known as the Grand Cañon of the Arkansas. A. Yes, sir; that is the line adopted. Q. State whether you are familiar with that Cañon. A. I am. Q. State whether at any point in that Cañon there is not sufficient room for the construction of two roads. A. I think there is room for the construction. Q. Have you ever made an estimate of the difference of cost of construction of the two roads, allowing them to be built upon the same grade

447 and nearly the same curvatures? A. Upon opposite sides of the Cañon, do you mean? I have not. Q. You have made no careful estimate. Have you made any estimate whatever? A. Simply by observation without doing any instrumental work. Q. From your knowledge of the Cañon, what would be the difference in the cost of the construction of the two roads? A. It would depend on the grades and curves. Q. On the grades and curvatures on which the Cañon City and San

448 Juan Company is building its road, with maximum grades of seventy-five feet to the mile, and curves

with a radius of three hundred and eighty feet? A. I should say the difference would be in the neighborhood of from fifty to seventy-five thousand dollars—that is putting the same grades and curvatures on opposite sides of the Cañon. Q. Would the difference in the cost of construction exceed the difference in the estimate you have made? A. That is my opinion as to the difference in cost; it cannot only be determined by an actual survey. Q. For what distance; then, would
449 there be difficulty in putting in two roads? A. The difficulty would be overcome by the difference in expense at all points. Q. On a former occasion you and others testified before the Court that there was a certain proportion of that road in which two lines could not be constructed; state whether you have had occasion very recently to examine it? A. I have recently been through the Cañon, and upon certain work we have done in encroaching upon the river, I have changed
450 my views; the reason of the change is we can encroach upon the river by the use of rock to build a roadway; there is room at all points; the narrowest place is about forty feet; that is room for two tracks. Q. From recent observation and survey you have had reason to change your former opinion? A. Yes, sir; and it is based upon the fact that we can encroach upon the river in making a roadway, and find it does not wash away.

Cross-Examination of Aaron A. Robinson: Q. You say you are now connected with the Cañon City and San Juan Railway Company as Chief Engineer? A. Yes, sir. Q. When were you so
451 employed? A. On the 19th day of April. Q. What time in the day? A. I could not tell you—

sometime between seven and eight o'clock, I should say, in the evening. Q. How long after I and Mr. Weitbrec met you on the ditch below the flume? (Objected to as immaterial; objection sustained.) Q. Who employed you as engineer of this company? A. I was appointed as engineer by the directors. Q. Any consultation with you before hand? A. Yes, sir. Q. By whose advice was it done—yours or theirs? (Objected
452 to and objection overruled. A. I could not tell you. Q. Now, sir, how much do they pay you, if anything? (Objected to as immaterial and not cross-examination; objection sustained.) Q. What are your duties as Chief Engineer? A. I am in charge of the construction of the road. Q. Have you anything to do with purchasing supplies for the construction, material for the construction, such as ties, bridge timber—things of that kind? A. I make the contracts for the work;
453 yes, sir. Q. Have you any control of that? A. No, sir; I am under orders of the General Manager. Q. Who is the General Manager? A. William B. Strong. Q. When was he appointed General Manager? (Objected to as not cross-examination; objection sustained.) Q. What control, if any, has the Board of Directors of the Cañon City and San Juan Company over your actions as Chief Engineer? A. I would have to refer you to the General Man-
454 ager for that; I am acting under his orders; he is my superior officer; I get my orders from him; I was appointed dlrectly by the company; as I understand it, I am responsible to my superior officers. Q. Do you recognize any responsibility to the Board of Directors of the Cañon City and

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San Juan Railway Company? (Objected to and objection overruled.) A. My responsibility or any orders—everything relating to that company, is through the General Manager; I don't know
455 anything further than that. Q. You don't know the directors at all in your business transactions? A. I know them—yes, sir. Q. In your business transactions? A. No, sir. Q. Do you hold any other position besides a position in that company? A. Yes, sir. Q. What is it? A. I am Chief Engineer of several railroad corporations. Q. What are they? (Objected to, as immaterial. Objection overruled.) A. Pueblo and Arkansas Valley Railroad Company, New Mexico and Southern Pacific Railroad Company, Wichita and Southwestern Railroad Company, Kansas, Topeka and Western
456 Railroad Company, Pleasant Valley and De Soto Railroad Company, Atchison, Topeka and Santa Fé Railroad Company. I believe that is all at this time. Q. Out of all those innumerable duties, you give your whole time to the Cañon City and San Juan? A. No, sir. Q. Who pays off these hands, Mr. Robinson, that do the work on that road? (Objected to, not cross-examination.) Q. I asked what, if anything, he has to do with the payment of his hands? (Objected to, and objection sustained.) *The Court*—The enquiry to which counsel directed his question was as to whether two roads could be constructed in this
457 cañon. Q. I will ask you whether or not, at any time since you have been appointed; I will say since the last day of April last; you have, in constructing the road through the Grand Cañon, purported to be or held yourself out as acting for

any other road than the Cañon City and San Juan Company? (Objected to, as immaterial and not cross-examination.) A. I don't know whether I have or or not; not to my recollection. Q. I will ask you if you have not since the 19th day of April, in dealing with persons for bridge tim-

458 ber and ties to be used in that cañon, dealt with them as the Chief Engineer of the Pueblo and Arkansas Valley road? A. I had no dealings with any one in reference to that subject, no contracts made, when they are made, they will be made in the name of the Cañon City and San Juan Company. I will state in connection with that question that the Atchison, Topeka and Santa Fé road is better known than these local organizations; perhaps at some time I may have mentioned their name as being a corporation better

459 known. All contracts are made in the name of the Cañon City and San Juan. (Handed newspaper.) Q. Is that your proposal? A. Yes, sir. Q. That was since you were made Chief Engineer of this road? A. Yes, sir. Q. What do you call yourself there? A. Chief Engineer of the Pueblo and Arkansas Valley Railroad, according to this notice. Q. Those ties are to be used in the Grand Cañon? A. No, sir. (Advertisement referred to, offered in evidence, entitled "Proposals.") Q. I will ask you if, in the construction of this road

490 through the Grand Cañon of the Arkansas, in which you are now employed, you are not acting for some other company than the Cañon City and San Juan Company? A. In the construction of the road through the Grand Cañon; no, sir; no other corporation; not in that connection. Q. Can you explain what you made that publication

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for? A. I don't know as it is necessary. Q. I don't know that it is either. *The Court*—I don't think it will need any explanation. Q. You say that you had one swear at this case as to the char-

461 acter of this cañon, and you have examined it more thoroughly, and have changed your opinion? A. With reference to the construction of the two roads; yes, sir. Q. And now your opinion is that the second choice of routes through that cañon will involve an expense of fifty thousand or seventy-five thousand dollars more than it would cost to build the road on the first choice of routes? A. That is an opinion. I hadn't made any careful estimates in regard to it at all.

462 Q. Don't you base this opinion upon the supposition that each road is to keep on one side of the river all the way; but if the company has the first choice so as to cross the river back and forth; then is not the diffierence between the cost of first and second choice of routes, a great deal more? A. No, sir; not in my opinion. Q. What proportion, or what part of this cañon does this additional expense cover the Royal Gorge; or do you estimate it from the mouth of the Cañon to the head? A. From the mouth of the Cañon

463 to the head. Q. When you testified before in this case as to the impracticability of the two roads through that gorge, had you been entirely through the gorge? A. I had not been entirely through it; that is one reason the Cañon is a little different from what I had been led to suppose it was from descriptions. It is very difficult to describe the gorge exactly. Q. What proportion had you been through of the gorge when you testified before? A. I could not give you the dis-

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464 tance; about two thousand feet out of sixty-six hundred. Q. You testified then by guess? A. No, sir, not by guess. Q. You testified then without seeing it? A. I testified on the reports of subordinate engineers. Q. Has the work on the road reached the gorge at this time? (Objected to, not cross-examination; objection sustained.) Q. Had you any connection with this company at all until you were appointed Chief
465 Engineer? A. None whatever. Q. How long had you known this company as a company? How long had you known its directors when you were appointed Chief Engineer? (Objected to; objection sustained.) Q. How did you happen to be at Cañon on the 19th of April last, and for what purpose did you go there? (Objected to; objection overruled.) A. I happened to be at Pueblo when the train for Cañon City left; I got on to it and left there. Q. Had no business there? A. My business was to go to take charge of the work of construction in the Cañon. Q. Hadn't been appointed then? A. No, sir. Q. Whose engineer was you acting as then? A. I have
466 already stated. Q. All those companies you have stated? A. Yes, sir, I represented. Q. Under whose immediate orders? A. I was my own man that day, acting under my own advice going up there. I had known a good while the construction was to be begun some day. I supposed I would have charge of it when it did begin. Q. On the 19th of April, when you started to go to Cañon, you went on your own motion, without any directions from any other company, and without any invitation from the Cañon City and San Juan Company. (Objected

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to, and objection sustained.) Q. I will ask you
467 if you didn't have any charge and supervision of that Cañon before you were appointed Chief Engineer of this road? (Objected to, and objection sustained.

Re-examination of Aaron A. Robinson: Q. In your answer to Mr. Macon, you speak of crossing the river back and forth through the Grand Cañon in the construction of the road. State whether your line as located crosses the river backwards and forwards? A. It crosses the river twice. Q.
468 Only twice? A. In the Grand Cañon.

TUESDAY, JULY 23D, 1878, 2 P. M.

Mr. Macon, for plaintiff,

Offers in evidence certificate of incorporation of D. & R. G. R. W. Co. ("It is in the files already.")

Offers in evidence act of Congress of June 8, 1872.

Offers in evidence act of March 3, 1875, entitled "An act to amend," etc.

Offers amendatory act of March 5, 1875.

Mr. Reed—We will make no objection to them; we have admitted them all in our pleadings.

Mr. Reed, for defendant,

Offers in evidence the letters identified this
469 morning,—one a letter from Gen. Palmer and two letters of Wm. S. Jackson; marked by clerk, filed in case. Letters as follows:

Colo. Springs, March 18, '73—W. J. Palmer.
May 17, '74—Wm. S. Jackson.
March 31, 73—W. S. Jackson.

TESTIMONY FOR DEFENDANT.

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Defendant recalled *B. F. Rockafellow:* Q. Where did you reside in 1873 and '4? A. Cañon City? Q. At that time, commencing in 1873, how far had the Union Contract Company, or the Denver and Rio Grande railroad completed a road to your place? A. They completed a road in October, 1872, to Labran or the coal banks.

470 Q. What distance? A. About eight or nine miles from Cañon City to Labran. Q. State whether any action was taken upon the part of the inhabitants of Cañon City to have a road completed to that place? A. Yes, sir; efforts were made. Q. At what time? A. About March, 1873, a committee of citizens met and appointed a committee to negotiate with Gen. Palmer, President of the Denver and Rio Grande road. Q. Who composed that committee? A. I am not positive who all the members were; I was one of

471 them, however. Q. State if, as a member of that committee, you had any communication, verbal or otherwise, with the officers of that company in regard to the extension of the road? A. I had several interviews, I think, but one in particular, about March 18th, with Gen. Palmer. Q. State what, if anything, was said at that time in regard to the intention or any intention of the company to

472 prosecute work in that direction further over their railway, by Mr. Palmer, as President of the Denver and Rio Grande Railway Company? (Objected to; objection overruled. A. Our conversation was about the amount that he demanded of the people of Fremont county, and he insisted on their giving—furnishing him bonds or securities—one hundred thousand dollars as compensation for extending. I will have to explain this in order to

give you an intelligent answer. We tried to get it changed to seventy-five thousand dollars, re-
473 duced to seventy-five thousand dollars, and his answer was the reason he asked so much or must have that amount at least, was because they could secure all the business at Labran as well as to extend it to Cañon City. I say this is my recollection; I won't state the exact words. Q. State whether it was substantially the result? A. Yes, sir. Q. Now answer the former question, and state what he said, if anything, in regard to his intention to prosecute the construction of a road further in that direction without assistance from Cañon City? [A. *Well, because they were contem-*
474 *plating building in another direction—building southward.* Objection to answer as irresponsive, and motion to strike out. *The Court*—Strike it out.] Q. Without the assistance of Cañon City, what did he say in regard to the intention or non-intention of constructing a road farther than Labran? A. My impression was—(objected to.) A. The result of the conversation was that they contemplated building south, not further west, and if they built up to Cañon City they must have pay for it.
475 Q. Now state what amount he required, or the company required through him to continue that road to Cañon City, and what the distance was; I believe you have stated the distance was eight miles? A. He required that we should secure fifty thousand dollars of bonds that had been then voted by the county, and vote an additional fifty thousand dollars in bonds. Q. State what was done? A. I believe we attempted to vote the other fifty thousand dollars and failed. Q. Then, what, if any, negotiations took place, and what

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476 was the result? A. Then we voted bonds of the town of Cañon City and deeded them real estate. Q. What was the amount of the bonds voted by Cañon City? A. Fifty thousand dollars. Q. What was the value of the real estate, estimated value at that time of the real estate? A. Well, they called it, they estimated it at fifty thousand dollars. Q. Who made that estimate—did the Denver and Rio Grande, through its officers do it? A. They took it in at the valua-

477 tion different parties placed on it. Q. What was the valuation they made,—fifty thousand dollars? A. I don't know whether they did. Q. State whether any lands were deeded them? A. Yes, sir; there were lands deeded them, and lots. Q. To the extent agreed upon? A. I so understood it; I am not positive. Q. At what time were the fifty thousand county bonds of Fremont county voted, that you speak of? A. Well; I don't remember; I think in 1871. Q. What was the amount of that bonded indebtedness created, for the purpose of getting a road

478 there? A. Fifty thousand dollars. Q. The bonds that he referred to in this interview; state whether this subsequent appropriation of fifty thousand and land was in addition to that? A. On account of our failing to get the county bonds, the other bonds were voted; not in addition to the county bonds; the lands were to be redeeded in case we secured the county bonds which had been voted. No county bonds were secured, and they held the lands. Q. State as near as you can the language used by General Palmer in regard to not con-

479 structing a road any farther? A. I could not state the language; could state the impression

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that I got, and nearly our whole public, I think. Q. What do you mean by the impression? A. The result of the conference. Q. And that you have already stated; have you? A. I have stated nearly as possible. (Handed letter of Gen. Palmer.) Q. State if you received that letter? A. I did. Q. In what capacity did you receive it? A. As member of that committee—the committee of
480 the citizens of Cañon City. Q. Did you receive it about the date? A. I think I received it the next day, or before I left Colorado Springs that night. Q. Was that written during the time that you, as that committee of conference, was conferring with General Palmer and the officers of the Denver & Rio Grande Railway Company in regard to extending the road to Cañon City? A. I think it was right away after the conference. (Handed letters.) Q. Look at these and see if these
481 were written at the time they bear date and were received, and whether they refer to the same matter? A. This is another committee, or other parties; this one of Mr. Jackson's. Q. Did you know anything about that at the time? A. Yes, sir. Q. Was it written in regard to the same subjec matter as the last one I referred to—the last one of Mr. Jackson's? A. The first one was about this same matter of the first interview of March 17th, 1873. Q. Then you state as the result of your negotiations with the Denver & Rio
482 Grande Company through its President that they declined to build further, and expressed their intention not to build further unless they were paid for it? A. That is the way I understood, sir.

Cross-examination of B. F. Rockafellow: Q. The fifty thousand dollars bonds first voted by the

county, were voted in 1871; were they not? A. I think those were not the first bonds that Fremont county voted; I am not positive as to the
483 date of the first issue. I am inclined to think the fifty thousand were voted in 1871. Q. Those were the first bonds ever voted by that county for any purpose; were they not? A. I am not positive as to that, whether that is the first vote we had or not. Q. Do you know where the railroad was completed to at that time? A. No, sir; I don't remember; I think to Pueblo. Q. Don't you remember the object in voting those bonds was to prevent the road from going to Pueblo—to cut
484 off Pueblo. Don't you know that I and you and a few others put that thing in motion in order to induce them to do that? A. Our intention was to get the roads with the bonds. Q. Had Palmer, Greenwood or Jackson ever had any correspondence or communication with us in any way in regard to voting the bonds? A. I think we got up the first bonds on our own motion. Q. Now, then, this matter you have referred to, or this proposition and the voting of the hundred thousand dollars,
485 or the voting of the additional fifty thousand and giving those we voted in 1871, was made in 1873, was it not? A. Yes, sir; some time in March, '73. Q. Upon that we proceeded to petition the County Commissioners that a vote be had, did we not? A. I think we did. A. And that vote came off in June? A. I don't remember the date that it came off. Q. In which we voted for a proposition to issue one hundred thousand dollars, with a condition that the first fifty thousand voted in '71 should not be called for. Don't you remember that? A. Possibly that was the way.

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486 Q. So the first fifty were dropped in that proposition, and we failed to carry that proposition by a majority sufficient? (Objected to as not cross-examination.) Q. Then that proposition of Gen. Palmer's you speak of, made in March, '73, was not carried out, was it? A. No, sir. Q. The work on the road remained suspended? A. Remained at Labran until the subsequent proposition of Mr. Jackson. Q. Until June, 1874? A. I think it was May or June. Q. Then the whole

487 thing was re-organized, was it not? A. Mr. Jackson made another proposition. Q. Palmer made no proposition at all on the second, did he? A. The last time? No, sir; I think Mr. Jackson was acting Vice President, managing. Q. You had a conversation in the spring of '73 with Gen. Palmer, in which you inferred from what he said that he had abandoned for all time the intention of building westward from Labran, and particularly from Cañon? A. I inferred they were going to build southward, by another route, as he was

488 then contemplating going to Mexico, and there was some talk about their line to El Paso. Q. On a visit? A. No; he was going in connection with railroad business. Q. He was going down personally, himself. You don't mean to say he was going to build his road down there? A. No, sir; I mean he was going there on railroad business, and they were contemplating building their

489 main line to El Paso, and gave us to understand they were surveying another line. Q. At that time they hadn't a shoveler on the line south. Did you know they had made a survey in March, '73, down there? A. That is the way I understood it, that they were surveying at that time. Q.

I think Mr. Mersereau was surveying then in the Sangre de Cristo Pass? A. That is my recollection. Q. Have you any knowledge of it yourself? A. Nothing except a general impression I have. Q. Can you recollect one passage in Gen.
490 Palmer's conversation upon which you based your conclusion that they had abandoned that route, and were going to seek another route for their road to Mexico? A. Well, the main thing was, that they talked about a branch to the iron mines, etc., and there was no conversation relative to an extension up the river, except that they were contemplating building by another route, and consequently Cañon must pay them. Q. Don't you remember distinctly, in the spring of
491 '73, either April or May, that this company, the D. & R. G. Company, put a corps of engineers looking for a route westward through Oak Creek, and that corps, with R. N. Clark as one, went through Oak Creek, went into the valley, and from the valley on towards Texas Creek, looking for a route westward? (Objected to; objection overruled.) A. I know they made an examination of Hardscrabble and Oak Creek Passes. My recollection is that they were trying to get off through the Moscow Pass; that way—not by the way of Texas Creek. Q. You don't know, then, they went on towards Texas Creek
492 to the foot of the Grand Cañon? A. I think they did not; I think they went towards Moscow and Music Pass. Q. That was the very time you say from conversations with Palmer you conclude they were not— A. No; I say at the time they made those examinations of Oak Creek and Hardscrabble Passes, I think they surveyed in that

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direction; what that date was I don't remember. Q. Don't you remember it was the very time we were in Wet Mountain valley preparing for this vote;
493 don't you know it was the time I and you were over in that valley and they surveyed some of the line, and young Greenwood was with you? A. I don't remember; I know they made an examination of Oak Creek more than once, and reported it impracticable. A. Yes, sir. Q. You cannot now repeat one word or sentence of Gen. Palmer's upon which you concluded that they had abandoned the road beyond Cañon City? A. Well, I remember distinctly relative to the seventy-five thousand dollars that I tried to get him to consent
449 first to receive fifty thousand, and then when he would not do that to get it reduced to seventy-five thousand, and my recollection is that Gen. Palmer was quite emphatic that we must raise the full hundred thousand, because they could secure that business at Labran as well as by building up to Cañon City; they were contemplating building in another direction. Q. Didn't what Gen. Palmer said about getting business from Labran, as well as from Cañon City, apply to the then condition of things; didn't he invariably, in speaking of this, say at this time there is no necessity of
496 building? A. I think he claimed the business at Cañon City would not pay for the road; he claimed he could secure the business at Labran. Q. Well, he could, couldn't he? A. Not as much, we claimed. Q. No, because we expected the town to become about as large as New York City, but it didn't. This fifty thousand dollars we afterward voted on an entirely different arrangement, carried out in the summer of 1874? A. I think

so. Q. And turned over to the company, and
496 they built the road according to contract? A. I think so. Q. These bonds have been since repudiated? A. They levy the interest. Q. Do they pay it? A. Some pay it; some don't.

Re-examination of B. F. Rockafellow: Q. Where is that Moscow Pass you talk about? A. I believe it is the first pass north of the Sangre de Cristo; I think it is the first. Q. To reach Moscow Pass on that survey—the Oak Creek survey—would it go through the Grand Cañon of the Arkansas? A. No, sir; skirt along the Wet Mountain Valley.

Here the defendant rested its case, asking to reserve the right to call the Register of the local
497 land office to-morrow, Wednesday, the 24th in regard to the approval of this plat, or afterwards to furnish proof from the general department.

PLAINTIFF REBUTTING.

The plaintiff called in rebuttal.

B. F. ROCKAFELLOW.

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Ques. I will ask you whether or not during the month of April last you were corresponding with the Pueblo Chieftain ?

Ans. Yes, sir.

Ques. What was—what is your *nom de plume* ? Objected to.

Plaintiff's Counsel. I propose to show what
498 Mr. Rockafellow said about who was building this railroad at that time. This was a question not brought to my mind until Mr. Rockafellow was dismissed from the stand yesterday.

The Court. I suppose it is not claimed he wrote these Articles as an officer of the road.

Plaintiff's Counsel. I don't suppose he did. I think he then had all the information as an individual that he could have as an officer.

The Court. Why not ask him directly what statements he has made? I am at a loss to know whether it is impeachment ——

499 Ques. Did you, or not, make this statement on April 22nd, 1878: "The situation grows more exciting each moment. The Atchison, Topeka and Santa Fé have on the ground at the present four hundred men and more coming. Wagons are continually going to the front, packed with men like sardines in a box, armed with shovels,

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picks, etc., etc. De Remer and men took to the river, and Holbrook, who having recently surveyed the cañon and was better posted, took to the mountains, and came out ahead, as usual for the Atchison, Topeka and Santa Fé. The whole country is in a hurrah of excitement for
500 the Banana line"? Objected to as an attempt to attack the credibility of their own witness. If admissible at all, it would not be as against the corporation. Objection overruled.

Ans. Not as an officer of the Cañon City and San Juan Company.

Ques. Did you make it as a man?

Ans. I made it as an anonymous correspondent, to tickle the public fancy.

Ques. Yes, that is all right—tickled—no question about that?

Ques. Did you make the following statement —dated April 27th, Cañon City:

"No arrests were made. The Atchison, Topeka
501 and Santa Fe men are not permitted to have fire arms, having positive orders not to make forcible resistance, unless obliged by an armed body of men." "W. B. Kean, train dispatcher of the Denver and Rio Grande Railway, who represents himself as being a deputy United States Marshal, acting under authority of the United States Court, was at the head of a party who drove out and took possession of provisions of the Atchison, Topeka and Santa Fe party, last night."

Witness. I refuse to answer the last on the
502 ground that if I was it would criminate myself in an action of—as to the first one, I will say these first questions, that these articles were written—

Ques. All I want to know is, whether you

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made that statement—did you or not make that statement?

Ans. I made that first statement. I object to answering relative to the last.

Plaintiff's Counsel. I insist on an answer to the last your Honor.

The Court. Let me see what it is, sir, (referring to article in newspaper) I don't see anything in that to involve a criminal charge—I don't see why you should object on that ground.

503 *Witness.* I wrote that, as I did those other newspaper articles, mentioned the Atchison, Topeka and Santa Fe, knowing it was the Cañon City and San Juan Company, at the same time that was building the road over that line, that the Atchison, Topeka and Santa Fe Company were not doing the work, but, as I said, they were made to tickle the public fancy, and I put it in, Banana line, etc., as an anonymous newspaper correspondent.

504 Ques. What line is meant by the Banana line?

Ans. It is generally understood in our section of country to be the Atchison, Topeka and Santa Fé.

Ques. Can you tell why it would not tickle the public fancy to use the name Pueblo and Arkansas Valley road?

Ans. Because that is a very popular line, a long line of road, and our people were anxious to get a connection with it. Objection by defendants.

505 The plaintiff called in rebuttal, McMurtrie, who had been sworn, and who further testified as follows:

Ques. You have already testified you made the survey through the Grand Cañon and the

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Royal Gorge. I will ask you if you found any great difficulty in finding a place anywhere in the gorge to stick your stakes? Objected that he has already testified he stuck stakes all the way through. Objection overruled.

Ans. There may have been one or two places, may have been three or four. I am not certain, where you could not get every stake in, I think there are two places, three places, where it would be necessary, perhaps you would miss one stake.

506 Ques. Now you have seen the map which has been offered here in evidence by Mr. Holbrook, I think he identified it; spoke from it; you may state whether or not an engineer could take that map, the profile, and without any stakes find where a line was?

Ans. I would not think he could

Ques. What is the necessity for having the stakes in order to locate the line, when you have got the profile?

Ans. To put in the side stakes, you see you have got to have the center line before you can side stake.

507 Ques. In using the field notes, and looking for a line surveyed, of what use are the stakes to you if you had got field notes?

Ans. You have got to have something to start from, because you don't know where his course was, it may be twenty-five or fifty feet off his line, you have got no stakes, got nothing to guide you at all in starting.

Ques. Have you been through the cañon since you stopped work in the cañon this last spring?

Ans. Have not been through the cañon; no, sir.

Ques. Have you been through any consider-
508 able portion of it?

Ans. I was at the upper end of it; yes, sir.

Ques. Have you seen the line which has been lately run by the pretended Cañon City & San Juan Company?

Ans. Yes, sir; I was at the upper end of the Royal Gorge.

Ques. How far is it from the work that was done there in 1871? Objected to as not rebuttal.

Mr. Reed for defendant. We admitted here this morning we were running through a part of that same work.

509 *The Court.* I don't think it is necessary to take up any time with that.

Ques. What effect, if any, does the absence of subdivisional lines on the public land through which you are surveying a line for a railroad have upon the correctness or incorrectness of that surveyed line? Objected to.

Ans. It has no effect on the line with the exception you can't tell which quarter section—which quarter the line will strike when it is subdivided.

Ques. What effect, if any, do the subdivisional lines have when you come to correct any faults that you have made in your line, or to enable you
510 to detect the faults by measuring from one corner to another?

Ans. I don't know as they have any effect at all.

The government surveys are so incorrect in this country, you cannot depend upon them; where they are subdivided you can get a copy of the field notes from the surveyor general's office, and thereby correct the notes from that, find out where the incorrectness is.

PLAINTIFF REBUTTING.

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Ques. In your work in the cañon, so far as you have gone how have you found the line upon which the Cañon City & San Juan Company is now constructing their work variant from their
511 original survey? Objected to; not rebuttal.

The Court. His testimony was altogether as to how far it *might be*—how far the line, as located upon the plat, might vary from the actual survey; that was the subject of the examination with him. If this is charged in your bill, it is a part of the original proof.

Mr. Macon. The object of the testimony is to show that Holbrook was incorrect as to the variations going on now.

The Court. He did not go into this subject at all. There was some inquiry of him as to whether these located lines on the plat were correct or not, and would probably prove correct.

CROSS-EXAMINATION OF McMURTRIE.

512 Ques. You say an engineer cannot find his line again without stakes?

Ans. No, sir, not without a starting point.

Ques. You say without stakes there was no guide, a man could not find his line?

Ans. No, sir, he could not run the same line through that cañon without any.

Ques. Without stakes there is no location?

Ans. No, sir, there may be a location on the map.

Ques. There is no location without stakes, do you say?

Ans. No, sir, there may be a location on the map.

Ques. Or on the ground?

Ans. No, sir.

FOLIO

Ques. When you went through the Grand Cañon and found no stakes of yours at all, you had no location?

513 Ans. I found stakes of mine.

Ques. You said you found them in the Royal Gorge, you didn't find them anywhere else?

Ans. Found a few of them.

Ques. Then you had no location?

Ans. Not on the ground.

Ques. Were not those lines of location, railroad lines, established by courses and distances?

Ans. Yes, sir, you have got to have a starting point.

Ques. When you have a starting point and courses and distances, can an engineer locate his line exactly, as it was located before, from his field notes?

514 Ans. No, sir, I don't think he could through that cañon.

Ques. When you made your pretended location of a railroad were there any township lines?

Ans. Yes sir.

Ques. Any subdivisions?

Ans. Yes sir.

Ques. Are subdivisions necessary to the complete location of a railroad?

Ans. Not necessary.

Ques. Have they anything to do with it, at all in locating through that Grand Cañon and Royal Gorge?

Ans. Not when they get right of way.

Ques. I am asking in regard to the engineering portion of it—the location of the line?

515 Ans. No sir, it has got nothing to do with it.

Ques. I mean without township lines or sub-

divisions, you can locate a correct line through that Grand Cañon or Royal Gorge, just as well as well as you could without it?

Ans. Certainly.

Ques. And that has nothing to do with it whatever?

Ans. Nothing to do with the location of his line.

Ques. When you came into the mouth of that Grand Cañon, did you find your starting point—did you find it this last time when you entered upon it.

Ans. I don't know, I didn't run this last line.

Ques. Was there any starting point—did you see your starting point where you commenced to survey?

516 Ans. Yes sir, could see it.

Ques. What was it?

Ans. It was right at the end of the Cañon City bridge.

Ques. If another party had started from the same point, could they have found the line?

Ans. If they started the same distance I did from the bridge, if they started exactly at the same point.

Ques. You say without a starting point a man could not find his line again—was there a stake at your starting point?

Ans. Yes sir.

Ques. Did you find it this last time?

Ans. I don't know as I did.

Ques. How did you find your initial point then?

517 Ans. I don't know that I started exactly at the same point

FOLIO

Ques. Then, if you didn't start at the same point, you didn't start upon your old location?

Ans. Started on the same right of way.

Ques. Through almost the entire distance of that Grand Cañon, if you went through it at all, you would be upon what you call right of way, would you not?

Ans. Yes, sir.

Ques. So would the other parties, would they not?

Ans. Yes, sir.

Ques. What was it you said about faults in the line to be corrected?

518 Ans. A man in platting up his line might turn an angle either to the right or left, the wrong way. If he had his township line he could find where the mistake was.

Ques. If a man had a starting point, as you say, had his field notes, courses and distances, would he turn the wrong way?

Ans. He might do it in platting up the line when he had his field notes.

Ques. You mean if it was S. 30 W——.

Ans. He might turn N. 30 E.; he might make that mistake.

Ques. It would be necessary to have a stake to correct that?

Ans. No, sir.

Ques. Only a re-examination of his notes?

Mr. Macon. That is all, with the exception of

519 Gen. Palmer's testimony. Thought that Gen. Palmer would be here in ten days—can't tell with any certainty.

On Wednesday afternoon, July 24th, counsel for defendant reads the stipulation in writing on file in this case as to admission of maps in evi-

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520 dence, admitting that the local land office at Pueblo did enter the right of way upon the township maps, and agreeing that the following letters may be entered upon the minutes, and returned to Mr. Barndollar.

[FIRST LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 12th, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: I am in receipt of Register's letter of 2d instant, transmitting proofs of organization of the Cañon City and San Juan Railway Company, together with map of route of the company's road from Cañon City to a point on the Arkansas river twenty miles distant, and asking if other papers are necessary, etc. Although there is no statement indicating the purpose for

521 which the papers and maps are filed, it is supposed from the fact that they appear to conform to the requirements of that law, that they were submitted to obtain for the company the benefits of the Act of March 3, 1875, granting to railroads right of way over the public lands. Believing them to be in due form, I have therefore forwarded them to the Hon. Secretary of the Interior for his action.

It would be better, however, for the president of the company to transmit through you an offic-

522 ial statement of the purpose for which they were filed, thus perfecting the record.

Respectfully,

M. J. BAXTER, *Acting Commissioner.*

FOLIO

[SECOND LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., June 22nd, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: You will please inform the President of the Cañon City and San Juan Railway Company that the due proofs of the organization of the company, in compliance with the Act of March third, 1875, transmitted to this office by you, June 2, are acceptable to the Honorable Secretary of the Interior, who has approved the map, showing line of company's road from where it
523 connects with the Denver and Rio Grande Railway in the southeast ¼ Sec. 28, T. 18, S. R. 70 W., to a point in the S. W. ¼ Sec. 26, T. 18, S. R. 73 W., Colorado, a distance of 20 miles in length. A copy of said map will be transmitted to you with instructions in a few days.

Respectfully.

J. A. WILLIAMSON, *Commissioner.*

[THIRD LETTER.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 13th, 1877.

Register and Receiver, Pueblo, Colorado:

GENTLEMEN: Referring to your communication of 2nd June, ultimo, transmitting articles of incor-
524 poration, etc., of the Cañon City and San Juan Railway Company, and map of line of route of that company's road from Cañon City to a point on the Arkansas River, twenty miles distant; I now transmit you copy of said map, it having received the approval of the Honorable Secretary

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of the Interior as having been properly filed by the company to obtain right of way over the public lands under the Act of Congress, approved March 3, 1875. By the public survey this line of route extends from a point where the road con-
525 nects with that of the Denver City and Rio Grande Railway Co., in the S. E ¼ Sec. 28, T. 18, S. R. 70 West, along the Arkansas River, to a point in the S. W. ¼ Sec. 26, T. 18, S. R. 73, W., Colorado. You will immediately lay down upon the proper plats the line of route of the road as indicated in the map, and, after receipt of these instructions, will dispose of the public lands over which the road will pass, subject to the company's right of way; and to the end that no difficulty or misunderstanding may arise as to the fact of their
526 having been so disposed of, subject to such right, you will make endorsement to that effect in red ink across the face of every receipt and certificate issued by you upon claims for such lands, *where such claims may be initiated in your office subsequent to receipt of these instructions.*

Please acknowledge receipt, giving date of reception, and reporting compliance with instructions.

Respectfully,

M. J. BAXTER, *Acting Commissioner.*

Defendant's counsel offer to the Court the following letter from Mr. B. F. Rockafellow, relating to his evidence in this case:

527 LAW OFFICE OF H. M. & W. TELLER,
DENVER, COLORADO, July 24th, 1878.

Hon. Moses Hallett, Judge U. S. Dist. Court:

MY DEAR SIR: I have the honor to request that in my testimony yesterday, where reference

is made to building R. R. to Cañon from Labran, that my answer be made to read that "we should *help* pay for it," instead of "pay for it," as I think was entered.

I am your obed't serv't,
B. F. ROCKAFELLOW.

[EXHIBIT NO.—]

Advertisement in Pueblo Chieftain of April 21st, shown to Mr. A. A. Robinson by plaintiff's counsel upon cross-examination:

PROPOSALS.

ENGINEER'S OFFICE,
PUEBLO & ARKANSAS VALLEY R. R. CO.,
PUEBLO, April 20th, 1878.

Proposals for one hundred and seventy-five thousand narrow-guage railroad cross-ties will be received by the undersigned at Pueblo, Colorado, until 6 o'clock, p. m., Saturday, May 11th, 1878, to be delivered as follows: Fifty thousand by September 1st, 1878, on the line of the Pueblo & Arkansas Valley Railroad between Trinidad and Dick Wooten's; Seventy-five thousand between same points by October 1st, 1878; Fifty thousand to be delivered by November 1st, at and between Cañon City and the west end of the Grand Cañon. Forms for bids and other information will be furnished on application at my office in the passenger depot of the A., T. & S. F. R. R. Company, Pueblo, Colo. A good bond for the completion of the contract will be required. The right is reserved to reject any or all proposals.

A. A. ROBINSON, *Chief Engineer.*

I, Henry L. Denison, the person mentioned in the stipulation of counsel, filed in the cause mentioned in the caption of the foregoing depositions, and in the said stipulation appointed to reduce to writing, and report the evidence in said cause under the control and supervision of the

Court, do hereby certify that the foregoing depositions, were taken in open Court, in the Circuit Court of the United States, for the District of Colorado, on the twenty-second, twenty-third and twenty-fourth days of July, A. D. 1878, and were by me, then and there reduced to writing, under the direction and supervision of said Court, and that the several, writings and documents above set forth, and the exhibits marked by the Clerk of the Court No 1, No 2, and No 3 and No 4 and No 5,

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were offered and given in evidence in said cause, during the taking of said depositions, and at the same time aforesaid, and that each of said witnesses was before his examination duly sworn according to law. And the above was all the testimony offered or given in said cause by either party.

In witness whereof, I have set my hand this twelfth day of August A. D. 1878.

Henry E. Denison

District of Colorado ss,

I, Moses Hallett, District Judge of the United States for the District of Colorado, do hereby certify that the foregoing depositions of witnesses as well on the part of the plaintiff as of the defendants, in a certain cause in the Circuit Court of the United States for said District, depending, wherein the Denver and Rio Grande Railway Company is plaintiff and Ebenezer T. Alling and others are defendants, were taken and given in open court, in the said Circuit Court, at the July term thereof, A. D. 1878, and on the days mentioned in the foregoing report thereof,

by Henry L. Denison, Esq., mentioned, under the direction and supervision of the said Circuit Court, wherein as District Judge of the said District, I was then presiding, and that the several interrogatories and objections thereunto, and answers to such interrogatories and the rulings of the Court upon such objections in the foregoing report of said depositions mentioned were propounded, made and given as in said report set forth, and that each of said witnesses was duly sworn and afterwards examined by counsel in open Court, and the aforesaid depositions were in open Court reduced to writing by said Henry L. Denison, and the documentary evidence in said report mentioned, and the exhibits thereunto attached, and respectively marked:

No. 1, No. 2, No. 3, No. 4 and No. 5.

were severally offered and given in evidence in said cause at the time of the taking of said depositions. And the foregoing is all the testimony offered or given at the hearing of said cause.

Witness the Hon. Moses Hallett, District Judge of the District of Colorado, this 12th day of August A.D. 1878.

Moses Hallett,
Judge.

Court, do hereby certify that the foregoing depositions, were taken in open Court, in the Circuit Court of the United States, for the District of Colorado, on the twenty-second, twenty-third and twenty-fourth days of July, A. D. 1878, and were by me, then and there reduced to writing, under the direction and supervision of said Court, and that the several, writings and documents above set forth, and the exhibits marked by the Clerk of the Court No 1, No 2, and No 3 and No 4 and No 5,

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were offered and given in evidence in said cause, during the taking of said depositions, and at the same time aforesaid, and that each of said witnesses was before his examination duly sworn according to law. And the above was all the testimony offered or given in said cause by either party.

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Henry E. Denison

District of Colorado ss.

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by Henry L. Denison, Esq., mentioned, under the direction and supervision of the said Circuit Court, wherein as District Judge of the said District, I was then presiding, and that the several interrogatories and objections thereunto, and answers to such interrogatories and the rulings of the Court upon such objections in the foregoing report of said depositions mentioned were propounded, made and given as in said report set forth, and that each of said witnesses was duly sworn and afterwards examined by counsel in open Court, and the aforesaid depositions were in open Court reduced to writing by said Henry L. Denison, and the documentary evidence in said report mentioned, and the exhibits thereunto attached, and respectively marked:

No. 1, No. 2, No. 3, No. 4 and No. 5.

were severally offered and given in evidence in said cause at the time of the taking of said depositions. And the foregoing is all the testimony offered or given at the hearing of said cause.

Witness the Hon. Moses Hallett, District Judge of the District of Colorado, this 12th day of August A.D. 1878.

Moses Hallett,
Judge.

EXHIBITS.

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And the said exhibits, marked B, C, D, No. 1, No. 2, No. 3, No. 4, referred to in the said report and certificate were and are in words and figures as follows, to-wit:

"EXHIBIT B."

CAÑON CITY, COL., *May 7th, 1874.*

To the Citizens of Cañon City:

GENTLEMEN: The Denver and Rio Grande Railway Company will extend their line from the present terminus, near Labran, to Cañon City, on condition of one hundred thousand dollars in bonds of Fremont County being delivered to them, or on condition of the delivery of 50,000 in the bonds of the town of Cañon City, legally issued to them, and $50,000 worth of real estate
535 being deeded to them or order, in default of the delivery of the 100,000 county bonds. The deeds to real estate may be void in case of delivery of bonds as aforesaid within one year from the completion of the road.

Yours very truly,

(Signed) W. S. JACKSON, *A. V. P.*

(Endorsed:) No. 154. Circuit Court, U. S. D. and R. G. Ry. *vs.* C. C. and S. J. R. R. et al. Exhibit B by defendants. Filed July 23d, A. D. 1878. Signed, Edward F. Bishop, clerk.

FOLIO

And the said paper writing marked "Exhibit C" is in words and figures following, to-wit:

"EXHIBIT C."

DENVER AND RIO GRANDE RAILWAY,
WM. S. JACKSON, Treas. TREASURER'S OFFICE,
Colorado Springs, Colorado, March 31st, 1873.

536 THOS. MACON, ESQ., AND B. F. ROCKAFELLOW, ESQ., *Cañon City, Col.*

GENTLEMEN: Your favor of 27th inst., referring to alterations that you deem it politic to have made in the proposition of W. J. Palmer, president, made to your people through his letters of 18th and 20th insts., is at hand.

Gen. Palmer left for New York on the 21st inst., and it is expected will sail to-day from that point for the City of Mexico, so that he cannot be reached to confer with in regard to changes suggested by you. And I am not authorized to alter or amend his proposition to you.

When the line is completed to Cañon City it will be that much line built in the direction of the iron fields of Grape Creek, thereby rendering this rich and valuable iron deposit much easier of
537 access and much more likely to be early developed than it will be by the terminus of the road remaining as at present, at Labran.

This should give the voters of Wet Mountain Valley an interest in having the line extended, and I am of the belief you will not find the opposition in that direction you are anticipating.

Awaiting your letter giving material you deem

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expedient to lay before the commissioners promised by next mail, I am

Yours very truly,

(Signed) WM. S. JACKSON,
Secretary and Treasurer.

(Endorsed:) No. 154. Circuit Court, U. S. D. and R. G. Ry. *vs.* C. C. and S. J. R. R. et al. Exhibit C, by defendants. Filed July 23d, A. D. 1878. Signed, Edward F. Bishop, clerk.

And the said paper writing marked "Exhibit
538 D" is in words and figures as follows, to-wit:

"EXHIBIT D."

THE DENVER AND RIO GRANDE RAILWAY COMPANY, PRESIDENT'S OFFICE,
Colorado Springs, March 18th, 1873.

B. F. ROCKAFELLOW, ESQ.,
Cañon City, Colorado:

DEAR SIR: At your request I send you the following letter containing the purport of our conversation to-day.

I do not consider that the expenses of continuing our line in the Arkansas Valley from Labran to Cañon City and of keeping it up will be warranted unless your people come forward to help with the work. But if the things hereinafter
539 named are done we will proceed to raise the funds as rapidly as possible, and if successful will complete the road to a depot not further than three-fourths of a mile from the new brick hotel in Cañon City, and will put the same in operation witnin six months from the date on which the

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additional bonds named below are deposited with a trustee as stated.

First. The 50,000 bonds, already voted and to which the company is now entitled, to be placed at once in the hands of Chas. B. Kountze, vice-president Colorado National Bank of Denver, or other trustee satisfactory to our company, with instructions to deliver the same to the Denver and Rio Grande Railway Company when the bridge over the Arkansas is finished and the iron laid across it.

540 Second. The county to vote an additional 50,000 of eight per cent. thirty-year coupon bonds, the coupons receivable for all taxes. The interest on said bonds to accrue from the date at which the line is completed to the aforesaid depot at Cañon City, the said bonds to be likewise deposited with the above mentioned trustee with instructions to deliver the same to the Denver and Rio Grande Railway Company upon the completion of the track to a depot situated within three-fourths of a mile from the new brick hotel aforesaid.

Third. The Cañon City people to procure the right of way, fifty feet wide, free of cost to the railway company from the present end of track to the property of the Central Colorado Improvement Company, near the mouth of the Arkansas

541 Cañon, and to place a perfect title for the same in the hands of the before-named trustee, which conveyance shall be handed over to the railway company as the line is built over the various properties.

Fourth. Your people to aid in procuring business for the line by the fitting up the Warm Soda

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Springs for three years free of costs. Bath houses to be erected and the locality to be made accessible to invalids and tourists. A sum not less than $2,000 to be expended during the four current months following the commencement of construction of the railroad and $1,000 more within the current year and a further sum of $1,000
542 yearly while the lease continues and while they shall occupy the springs. The improvements to be taken off the hands of the parties at a fair appraised value when the company shall conclude after the expiration of the said three years; to extend the work of improvement on their own account.

Fifth. The 600 acres be the same, more or less, of land accruing from A. E. Mathews, under a contract for constructing a ditch to irrigate it, to be relieved from that part of the agreement requiring the ditch to be built, and that one-half of the land due under said contract shall be deeded to the Central Colorado Improvement Company,
543 or as they may direct, in fee.

The deed to be deposited with the trustee named previously, and to be handed over on completion of the line to depot aforesaid. In the In the event of the ditch being built according to the original understanding, (except as to time) within three years from the date hereof, the title to the whole amount of land, as originally agreed, to be delivered to the Central Colorado Improvement Company.

The coupons of the 100,000 of the bonds of Fremont County due under this arrangement to be made payable either in New York or at County Treasurer's office, at optior of holder, and to be receivable for taxes.

EXHIBITS.

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In conclusion, I trust the citizens of your
544 county will be able to hold out the above named inducements to immediate construction.

Yours respectfully,

(Signed) WM J PALMER,
President.

(Endorsed:) No. 154. Circuit Court, United States. D. and R. G. Ry. *vs.* C. C. and S. J. R. R. et al. Exhibit D, by defendants, (letter of W. J. Palmer, president). Filed July 23d, A. D. 1878. Signed, Edward F. Bishop, clerk.

No. 154—EXHIBIT 3.

SECOND ANNUAL REPORT OF THE BOARD OF DIRECTORS OF THE DENVER AND RIO GRANDE RAILWAY TO THE STOCKHOLDERS, FOR THE YEAR 1873.

REPORT.

To the stockholders:

In the last report the net earnings from the main line for the year 1873 were estimated at $259,000. Chiefly in consequence of the panic they have fallen short of this estimate nearly 22 per cent.

For the first eight months of the year—prior
545 to the panic—they footed up $140,000, which, continued only at the same rate, would have given $210,000 for the year. But better than the average months were to come, so that, in all reasonable probability, they would have reached $225,000 but for the results of the great financial storm of September, which had the effect of diminishing

the net earnings for the year to the sum of $195,529.58. This does not include any construction material or travel.

546 That this company was able, notwithstanding a panic which caused the failure of seventy-seven railroads in the United States, to meet all of its obligations promptly and survive the gale is a matter worthy of congratulation. It is to be attributed chiefly to the fact that the route occupied is one which possessed the elements for a good local trade, and that each division was able to follow the principle of "pay as you go;" also to the fact that the *narrow gauge* permitted an econ-
547 omy in building and operating without which we could not have avoided the common fate. With so new a line had the additional interest upon capital and cost of operating, required by the standard gauge, been imposed upon us, we could hardly have escaped. * * *

The present local business of passenger and freight—already sufficient to support the line—will go on increasing because Colorado is growing rapidly in population and production; and when
548 the line can be extended one division southward to Trinidad, (the local business to which from Pueblo is considered as good per mile as that of the present line,) the added through business to be obtained at that point will be almost clear net gain, and ought to give the company a considerable yearly surplus over all obligations.

It is by delaying for at least a year the building of this Trinidad extension and by postponing the completion of the branch line in the Arkansas
549 Valley to its proper terminus at Cañon City, which would have thrown a considerable new

traffic over the whole length of the main line, more perhaps than by causing prostration in the actual carrying business, that the prosperity of the company has been most retarded by the panic.

As regards the Trinidad extension forty miles, from Pueblo to Cucharas, have been graded, and other work done and expenditures made in consequence of it, in part payment of which $86,000
550 additional bonds have been issued by the company up to January 1st, 1874.

No other increase in bonds was made during the year and no floating debt was incurred.

Negotiations are on foot which are expected to lead to the completion of this division to Trinidad (between ninety and one hundred miles) during the approaching fall or winter.

The additional improvements on the line between Denver and Pueblo, of which a list will be
551 found in the appendix, and which consisted chiefly in strengthening all the bridges by additional stringers, substituting stone culverts for wooden bridges, putting in cattle-guards, new side-tracks, snow-fencing, cattle-yards, new depots, water-stations, additions to shops, and other new buildings, with a few new cars, and the addition of Miller platforms and Westinghouse brakes to all passenger trains, to increase their safety, have been paid for, (together with the two months
552 interest from November 1st, 1872, to December 31st, 1872), by the Union Contract Company, in accordance with the contract for the construction of the road.

It was intended to complete the Arkansas branch to Cañon City early in the autumn of 1873, but the financial condition of the country

compelled us to leave it in an unfinished state. The line being considered under construction, the interest on the bonds issued under this branch
553 mortgage (all of which are owned and permanently held by trustees for the Central Colorado Improvement Company) was paid by the same construction company, who operated the branch and received all of the earnings, and they will continue to be so paid until November 1st next, inclusive.

By the tonage it has thrown over the main line, and the cheap and excellent coal it has furnished for operating the railway, this branch has already been of considerable benefit to the main line, but it was never expected to pay
554 directly until so completed, and the interest during construction was included in the original estimates of cost of the work.

However, the nine miles required to reach Cañon City are now completed (July 6, 1874) and for the twelve months following November 1st next, the branch will probably earn its interest. It will besides, by the additional passenger travel and freights of merchandise, stone, ores, hay, cattle, potatoes, coal, etc., which this completion will
555 throw over the main line—using the latter chiefly for 120 miles to and from Denver—add to the *net earnings* of the main line for the coming year, the estimated amount of $86,000.

The business and prospects of this branch will be more particularly referred to hereafter.

COMPETITION.

The figures of tonage above cited will be sufficiently convincing of the fact that no appreciable

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business has been taken away from this road by
556 the extension, during the year 1873, of the Kansas Pacific Railway from Kit Carson to Las Animas, (84 miles east of Pueblo, on the Arkansas River) nor by the extension of the Atchison, Topeka and Santa Fé Railroad to Grenada, in the same valley, about fifty miles east of Las Animas. They have at times, in competing with each other, had some effect in reducing our rates on freight bound from the East to Pueblo, and on the small traffic we have had for points south
557 thereof.

These roads, it is true, do the direct freight business between the East and New Mexico, including Trinidad, but as explained in our last annual report, the Denver and Rio Grande Railway has never enjoyed this business, and for the last two years has never expected to, until the line could reach Trinidad, which is a common meeting point on the New Mexican highway, between ninety and one hundred miles south of Pueblo.

558 Meanwhile the further extension toward the southwest of those lines seems to be indefinitely postponed by the failure of each company to meet its interest obligations.

Even if they were able, it is certainly not the desire of the Kansas Pacific, and apparently not that of the Atchison, Topeka and Santa Fé to extend their line towards Trinidad, since that would not be warranted by the local resources of the intermediate one hundred and ten miles of
559 grazing "plains" between the Arkansas River at Las Animas and Trinidad. The rich Arkansas Valley, occupied by the largest river flowing eastward from the Rocky Mountains for over one

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thousand miles of latitude, and which can be colonized and cultivated for the entire distance, lies open to both, and is apparently the battle-ground for which they have been contending. This would bring them to a junction with the Denver and Rio Grande Railway at Pueblo; and
560 while there is not now a prospect of its being occupied by either company for a long time, yet that this line will be completed by a third and neutral party before the close of 1875, is tolerably certain. In fact, the road-bed is now being actively constructed. Its completion will make a large city at Pueblo, greatly to the increase of the north and south travel and freight of the Denver and Rio Grande Railway, and will throw a large tonnage over the latter in coal, lumber, fencing-
561 stuff, ties, potatoes, and a variety of products to supply the colonists along the new east and west road, with certain surplus products of these settlers in return to the mountain base towns on our main line and branch. The Arkansas Valley being without timber, the entire population of this upper part of it for at least one hundred and perhaps three hundred miles, must use for their buildings and fencing timber from the mills on our road, and for fuel, coal from Cañon City. Besides
562 this, the new road itself would take perhaps one hundred and fifty tons daily of coal at once for its own use, and to supply the locomotives and shops of the Western Divisions of the Kansas Pacific, and Atchison, Topeka and Santa Fé Railroads.

It will be observed, also, that the completion of such a line to Pueblo will open up another route between Denver, (as yet the largest consumer and main distributing point of the Rocky Mountains,)

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and the Eastern States, of which line one hundred
563 and eighteen miles of the Denver and Rio Grande Railway would form a part, and share the benefits.* This new business would very much more than compensate for any loss likely to be suffered on traffic between the East and Pueblo, now going *via* Denver, leaving the new local trade, of which we have spoken, as a further clear gain.

As a matter of fact, however, we shall, probably, always retain a fair share even of the business between Pueblo and the East, especially that
564 which originates in, or passes through, Chicago. This arises from the fact that the 1,000 or 1,1000 miles of railroad *via* the Union Pacific, between Denver and Chicago, will soon come into the market at Denver for business, either by the completion of the remaining one hundred and seventy miles, from Longmont to Julesburg, necessary to give the connection; or from the effect of the recent act of Congress to enforce the anti discrimination clause of the Union, Kansas, and
565 Denver Pacific charters. This line is so long, and will be so much benefitted by every additional ton or passenger, from a new source, which passes over it, that it can afford to make rates which will enable it to get a fair portion of the Pueblo business, which it can only do by passing it over one hundred and twenty miles of the Denver and Rio Grande Railway.

The Eastern trade originating, or destined, south of Pueblo, to Southern Colorado and New
566 Mexico, will, for the greater part, be controlled by the Denver and Rio Grande Railway Company, when the line reaches Trinidad. Should

*The carrying trade of Denver with the East now yields the Kansas Pacific Company about $1,500,000 yearly.

the Atchison and Topeka line, however, revive and become able and desirous to strike off from Grenada, in the Arkansas Valley, southwestward to Cimarron, a distance of about two hundred miles, it would, of course, carry the larger share of the eastern and western traffic of the particular locality at the mountain base to which it might

567 be extended. As the great bulk, however, of the traffic of Colorado, New Mexico, and Arizona, will always exist in the mountains, where it can only be gathered up economically by narrow-guage lines, the extension named would fail to divert from the Denver and Rio Grande Railway any considerable share of traffic, even of that coming from or going to the East, except so far as it might become advantageous in the exchange of business.

568 If the Denver and Rio Grande Railway and side lines are built as planned, the system must, from the character of the country, always be unusually free from the risks of competition.

Of course the company has always contemplated that for a certain portion of the east and west business of Colorado and New Mexico these lines might become one day competitors, especially if the Denver and Rio Grande should stand stock still. The *North and South* transportation

569 of the rich country near and in the mountains is that, however, for which this road and the narrow gauge system of the Rocky Mountains were originally planned and always specially intended in connection with the entire supply of most of the country west of the north and south trunk; but that the Texas and Pacific, Atlantic and Pacific, Atchison, Topeka and Santa Fé, Union Pacific,

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and in time other lines, would bring the Eastern traffic to us at various points and at various
570 latitudes for distribution and take away our surplus productions to the East was no more doubted than that the Kansas Pacific was already doing the same thing. So far from feeling that this was objectionable we have considered it always as a decidedly advantageous feature in our case. The several east and west lines can only get this Eastern trade from and to its markets by passing it over a certain distance of the Denver and Rio Grande lines. Preserving a strict impar-
571 tiality, the temptation to local aggression by either of those companies would naturally be greatly diminished and all would be benefitted. We have no quarrel to make therefore with any east and west line and, so far from fearing their effects we welcome them all, and will treat each as the most favored Each new one cannot fail to give us more even of through traffic than it will take away, while each will add a new large distributing point on the line of our road for the interchange
572 of traffic with the local country along its east and west line.

I repeat, however, that by reason of the character of the resources of the country through which our lines pass, the great bulk of their business is, and must remain, local, and these questions of through traffic and competition do not particularly effect us. To avoid any misapprehensions, however, it has been deemed best to set the case forth clearly and fully in this report.

573 THE GROWTH IN POPULATION ALONG THE LINE

During the year has been very encouraging, es-

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pecially at Colorado Springs, which doubled in population.

The towns of Littleton, Monument, Fountain, Plum, etc., have also shown considerable increase.

Denver and Pueblo did not perhaps grow as rapidly in 1873 as heretofore but have since taken a fresh start.

Cañon City made no progress because the rail-
574 road had not reached it.

There was a notable increase in cultivation, fencing and building along the line, and in the valleys leading therefrom up to and into the mountains and on the fertile plateaus between the railroad and the mountain base.

On the "Divide," an extensive district within the rainy belt, which is crossed by this road, the parks or untimbered lands have been taken up to a considerable extent during the year by settlers,
575 who did well by raising, without irrigation, potatoes, barley, hay, oats, and some wheat. Ten thousand pounds of potatoes of a superior quality per acre are considered an average crop in a good season. The area of this valuable district, on which the rainfall is perhaps 100 per cent. more than on the plains and lower valleys, and is sufficient to mature the crops named in average seasons, without irrigation, as well as to produce a natural growth of pine timber, is roughly esti-
576 mated at five hundred square miles. It is also admirably adapted for dairying purposes. Its growth during the past year is an indication of its future. It is destined to be occupied by a large population.

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SAN JUAN.

This promising silver, gold, timber, and agricultural district, lying southwest of the Arkansas Valley, was briefly referred to in our last report, as then beginning to attract the attention of
577 miners and other colonists. During the past year the new discoveries were so rich and attractive that toward its close a large emigration set in for "the San Juan" and the country tributary to it. The considerable towns of Del Norte and Loma were built up on the Rio Grande where it emerges from the mountains on the San Luis Park, and supplies of every kind including machinery for the mines and reduction works were shipped to them from the north and east.

578 Had the business all gone over this road we should have had large returns from it particularly this spring. But unfortunately our line was not sufficiently extended, and the wagon roads from Pueblo and Labran were not sufficiently good to command the trade as against the better though longer wagon roads from Denver and Colorado Springs. What share was obtained by this company chiefly left the line at Colorado Springs, yielding the company a transportation of seventy-
579 six miles from Denver.

A fair wagon road has since been built from Cañon City, which is the nearest and best situated of all the towns competing as outfitting points and supply depots for the San Juan trade, and the now accomplished completion of our railroad to that point will naturally throw the great bulk of this San Juan freight and travel, as well as that to the Gunnison Valley, the San Luis Park, the

South Arkansas, and Lake County, over the
580 whole length of the railway and branch, one hundred and sixty-one miles, to Cañon City. A tri-weekly coach line, which is soon to be made a daily, has been established from this terminus to Saguache, Del Norte, and the San Juan country.

SOUTH PARK.

A tri-weekly coach line has also been established between the railroad at Colorado Springs and Fairplay.

The South Park mines have done well, but in
581 consequence of the long distance (one hundred miles) from the railway, have found some difficulty in obtaining a market for their ores. Other smelting works have since been erected, however, and the capacity for reduction is doubled.

The trade of the South Park, which has mainly sprung up during the past year, and reaches the road at Colorado Springs, is one that promises to be of great importance to this company.

The South Park is a great basin in the Rocky
582 Mountains, comprising about 15,000 square miles, with an extreme width between the east and west rims of about seventy-five miles, and of about forty miles between the north and south rims. These rims and their slopes for a certain distance are covered with pine timber; the basin enclosed is a beautiful grassy park, watered by the South Platte River and its numerous tributaries, and interspersed with ranges of hills, more or less wooded, with separate glades and intervales, in
583 which are already seen grazing thousands of cattle. The westward wall of the park is formed by

the "Snowy Range," or Sierra Madre, the backbone of the American continent, dividing the waters which flow towards the Atlantic and Pacific Oceans. On the eastern rim is Pike's Peak, at whose northern foot is the "Ute Pass," the crest of which is twenty miles from Colorado Springs, and which forms the lowest and best entrance into the park from the settled and pro-
584 ductive farming country on the watered plains at the eastern base of the Rocky Mountains. Although oats, barley, and potatoes, with most of the root crops, flourish, yet in the main the South Park is too elevated to constitute a reliable farming district; but it is so admirably adapted to the raising of cattle and sheep, and the production of the finest butter and cheese, on a scale to which it is difficult to imagine a limit, that it can scarcely be a source of regret. As a choice dairy country,
585 high and cool, almost exempt from flies and other insects which torment cattle, containing the most nutritious grasses, and full of springs of the purest water, it is capable of supporting a more prosperous, if not as large, a population, as though it could be covered with fields of corn and wheat. It ought to supply St. Louis, Chicago, and the Mississippi Valley with their choice butter, cheese, chops, and steaks.

But important as the grazing interest is and
586 may become, and valuable as the forests of timber are, since the towns and farms of the unwooded plains at the eastern mountain base must be chiefly supplied therefrom, the chief interest and value of the South Park, to a carrier of goods and people, are centered in the rich mines of silver, gold, and lead which have been opened,

mainly within the past year, west of Fairplay, on Mounts Lincoln and Bross, and elsewhere on the continental dividing range which forms the west-
587 ern border of the park.

This mining district is distinguished by the large number of silver lodes which have been discovered, and are being more or less worked, as well as by the great richness of the ores of a number of them. If the developments continue as favorable as heretofore, it will not be exceeded in importance by any of the silver regions of the Rocky Mountains.

There also numerous gold lodes, besides the
588 placers.

Three reduction works have already been established at and near Alma and Dudley, but as the charcoal will be rapidly exhausted—since the supply of wood accessible to the mines is estimated, in connection with all other requirements, and the occasional destructive mountain fires, as being good for only four years' supply—the great bulk of the ores must be carried down to Pueblo to meet the great metallurgical coals of the
589 Arkansas Valley.

The richer ores and the "matte" or base bullion produced at such smelting works as may be located in the South Park will go to the Atlantic Seaboard or to Europe for reduction. A considerable transportation of these ores has already taken place over the Denver and Rio Grande Railway.

The South Park not being an arable country, all or nearly all of the food for the miners, min-
590 ing towns, and the rest of the population must come up from the fertile fields at the eastern base

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of the mountains—through which run the main line and Arkansas branch of the Denver and Rio Grande Railway. Besides the breadstuffs, there will be a large amount of other in-bound freight to be shipped to supply the extravagant wants of a mining community, and the requirements of the mines, reduction works, and dependent towns—groceries, fruits, clothing of all kinds, household
591 furniture, tools, powder, machinery, quicksilver and chemicals, fluxes, iron rails, mine cars, rope, fire-brick, coal—all of which must come from the mountain base, or "the East."

Besides the South Park, there are the important additional mining districts contiguous to it, on the "Upper Arkansas" and "Upper Blue," in Lake and Summit Counties, to be supplied—the mines of the "Granite District," "California Gulch," "Tennessee Pass," of "Breckenridge,"
592 and "Snake River."

The fame of the South Park for its grand mountain views, and mineral springs, has already induced a considerable summer tourists travel, which will be greatly increased, as better conveniences for reaching it and good hotels are furnished. There will be, besides, the increasing emigrant and prospecting travel, the business travel both ways, and the regular outgoing travel of placer miners, mechanics, merchants, etc., on
593 the approach of each winter, to spend the cold months at the mountain base—to school their children, obtain society and pleasure in the larger towns, and avoid the rigor of a winter in the upper end of the park. As spring approaches, these go in again to the mines. This is the custom of the country.

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All that has been described yields constantly increasing travel and traffic over the Denver and Rio Grande lines.

594 Surrounding South Park and on the way to it from the east, are several smaller parks at a lower elevation—Bergen's Park and others—which, being within the natural rain belt, are fine agricultural valleys, and raise oats, wheat, barley, potatoes, and certain other vegetables, flax, and hay, without irrigation. These subordinate parks constitute a district of great natural beauty, fine meadows, sweet, cold water, and sheltered coves, enclosed by forests of pine timber. They are
595 rapidly settling up.

Between Colorado Springs and the eastern foot of the South Park there are estimated to be accessible 210,000 tons of sawing timber, beside ties, telegraph poles, bridge piles, and cord-wood. Seven saw-mills have been erected on the route.

Entirely apart from the mines, we estimate the dairying, stock-raising, forage, and other resources of the South Park, and its dependent smaller parks, when developed, as capable of supporting
596 a population of at least 100,000.

We have been thus explicit in describing, as far as they bear upon the business of railroad transportation, the resources of the mountain country west of Colorado Springs, and reachable by the Ute Pass, because it will afford a good general idea of most of the country west of our north and south railway route from Denver to El Paso. There is a great uniformity in the topography and characteristics of the whole of this
597 slope of the Rocky Mountains. The park formation prevails throughout, although generally at

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lower altitudes than the South Park, and by once thoroughly comprehending the nature of the traffic which will seek and leave the railroad at Colorado Springs (with the character of the country west of it for one hundred miles), and the inter-dependence of that mountain country and the plains at the eastern base, one will understand the character of what is going to furnish no un-
598 important share of the business of this railroad as it advances southward.

In due time, connecting railway lines will be extended up these passes to further develope the several rich and extensive districts which they will penetrate.

Thus the railway system of Colorado and New Mexico, with the adjoining territories, will be constituted.

TRINIDAD EXTENSION.

The inducements to complete the line to Trin-
599 idad (between 90 and 100 miles southward of Pueblo), which were briefly referred to in our last Report, have been strengthened since then by the further knowledge which has been acquired concerning a valuable coal field of great extent,* extending along the mountain base from Cucharas to Trinidad, and in Raton Mountains, some of the numerous beds of which have proven to be of a superior *coking* coal; also by the discovery of iron ores, near Trinidad, of those kidney and
600 other varieties, which are so desirable for admixture with the rich magnectic ore of Cañon City.

The Territories and States of the Rocky Mountains are great producers of silver and gold, lead,

*Estimated at 900 square miles between Cucharas and the Raton Mountains.

copper, and other metals, which must be reduced from their native ores. Throughout an area of over one million square miles, metallurgical operations will be required. The demand for an adequate fuel for reduction is therefore already large, and as this vast mineral territory is still
601 further developed, it will become in time enormous. Charcoal from wood has heretofore been chiefly used, but the sparse forests are being rapidly thinned out, and the wagon-haul will soon be too long to permit extension.

It would seem, therefore, to be difficult to overestimate the importance of this discovery.

Interesting reports by Governor Hunt and officers of the company upon the business to be obtained and advisability of this extension to
602 Trinidad, will be found in the Appendix. The estimated increase of *net* earnings to the line, resulting from this extension, for the first year after completion, is $200,000, while the addition to the yearly interest obligations are estimated at not over $125,000.

PRESENT CONDITION AND FUTURE OUTLOOK—JULY, 1874.

The *direct* effects of the panic upon the earnings of the road were over with the month of April of the present year. From January to
603 April inclusive the net earnings of the main line (118 miles) were - - - $39,573 57
While for the same period and same distance in 1873, they were - 58,358 45

Decrease 32 per cent. - - $18,784 88

Since April they have been on the same line as follows:

EXHIBITS.

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		Net, 1873.
	May - - - - - -	$20,045 06
	June - - - - - -	22,545 04
	July - - - - - -	19,936 38
		$62,526 48

		Net, 1874.
	May - - - - - -	$21,058 28
604	June - - - - - -	23,674 19
	July - - - - - -	25,000 00
		$69,732 47

Increase for last three months of 1874, in net earnings, $7,206, or 11½ per cent.

As this comparison is made with the best months of 1873 (which were almost immediately followed by the financial panic), the net results for the present year will undoubtedly show a considerable increase over those of 1873.

The interest obligations of the main line now
605 amount to about $20,000 currency per month.

ARKANSAS BRANCH.

The interest obligations of the Arkansas branch to November 1st, next, inclusive, as heretofore stated, will continue to be paid by the Union Contract Company, who will receive the earnings of the branch until that time, and hand over any surplus to the railway company.

It is believed that another year's growth on this division in its coal trade, and the carrying of building stone, ore, cattle, hides, in the population
606 of Pueblo, Cañon City, and Labran, the development of the Hardscrabble Silver Mines, the in-

creased production of Wet Mountain Valley, the pleasure and health travel to the hot and cold mineral springs of Cañon City, and the transportation of general merchandise and machinery to the San Juan and other mining districts, west and southwest, can scarcely fail to result in entirely satisfactory earnings.

The mortgage on the branch is entirely distinct
607 from that on the main line, and is for $1,040,000, on which the total interest obligations are $72,800 gold yearly. The bonds are all held by the trustees for the Central Colorado Improvement Company.

According to our estimate besides the net earnings of the branch itself a larger sum than this interest will be added to the present net revenues of the main line alone during the following twelve months in direct consequence of the con-
608 struction of this branch and chiefly by reason of its completion.

Since this completion Cañon City has taken a start, and as it is now a terminal railroad point and quite favorably situated to become a permanent supply depot for important districts on every side of it, it may be expected to grow as rapidly as the other towns have done along the line. It has besides considerable advantages as a manufacturing and reduction site, possessing as fine a water
609 power as the Connecticut River Valley in connection with proximity to excellent coal, iron ore, and copper lodes, and having the developed silver and gold mines of the South Park on the northwest; "Chalk Creek," "California Gulch," "Granite," and Tennessee Pass on the west; San Juan and the Gunnison Valley on the southwest, and

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the "Hardscrabble" silver mines on the south and east to furnish the precious ores.

As a resort for tourists and invalids Cañon City
610 has attractions which will give it in some respects the preference over all others in Colorado, certainly for eight months of the year, including the winter, when many tourists, although desirous of remaining in Colorado, for what is here relatively the most attractive season, have nevertheless considered it too cold in the northern part of the Territory. It lies in the low, warm Arkansas Valley, thoroughly sheltered in an inlet and under the lee of the mountains; enjoys a temperature
611 probably 10° higher than that of Denver, and has warm as well as cold mineral springs. At the former, the Central Colorado Improvement Company have just erected bath-houses. The natural temperature of the water is 100°. The grounds around, as at Manitou, near Colorado Springs, are being laid out in villa sites, drives, paths, and parks, by the Central Colorado Improvement Company, to whom they belong, and before long will no doubt be covered, as at Manitou, with
612 hotels, sanitary establishments, and private residences of the well to-do, seeking health or relaxation. The surrounding scenery, including the Cañon of the Arkansas, is among the grandest in Colorado.

South Pueblo has attained a population of about 800. Its growth has been checked by the temporary stoppage of railroad construction down the valley eastward, and southward towards New Mexico. As soon as these lines are renewed
613 in earnest, the population will flow in more rapidly, doubtless, than to any point in Colorado.

This town is believed to have the location and resources to make it the most important city in the Rocky Mountains, from British America to the Mexican border.

A careful report by Mr. R. N. Clark, civil and mining engineer, upon the superior adaptability of Pueblo for the location of smelting works, rolling mills, and foundries, will be found in the
614 appendix.

The Central Colorado Improvement Company have recently adopted the colony plan of settlement for their town of South Pueblo and the surrounding arable lands; and, under this plan, the place has begun again to grow, without waiting for railroad extension. The plateau upon which this colony is being planted, and which is irrigated by a canal from the Arkansas River twenty miles in length, appears, as far as tested, to be equal in
615 fertility to any land in Colorado, or perhaps in the United States, yielding readily forty bushels of excellent wheat to the acre.

The rapid past and continued growth in population and values at Colorado Springs and vicinity, where about 4,000 inhabitants have been introduced by the Denver and Rio Grande Railway—all in three years and chiefly in the last 18 months, and which possesses very limited advantages as a commercial and manufacturing centre compared with those at South Pueblo—will afford some
616 idea of how rapid will be the growth of the latter, situated, as it is, on the largest river of Colorado, and most favorable for railroad concentration—when its turn comes. The appraised value for taxable purposes (perhaps one-half the market value) of the town of Colorado Springs, for the

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year 1874, is equal to about the first cost of building the railway to this place from Denver, seventy-six miles. About three years ago it was public land, without an occupant.

617 Denver, which has grown to a handsome and substantially built city of 20,000 inhabitants (from 5,000 when the Denver and Rio Grande line started), is a more apposite example of the near future in store for Pueblo.

The population of the original town of Pueblo, on the opposite side of the Arkansas River, is now estimated at 4,000.

THE HARDSCRABBLE SILVER MINES.

618 Among the entirely new resources of the road, and especially of the Arkansas branch, is the silver district of Rosita, on the Greenhorn Range, twenty-six miles southward from the Cañon City coal-mines of the Central Colorado Improvement Company. Here, some fifty or more silver lodes have been discovered and opened, ranging in width of lode from two and one-half to ten feet; in width of pay-rock from four inches to twenty-four, and in estimated "run of rock" from $55 to $300 per ton.

619 The district has been sufficiently developed to demonstrate that it will, in all probability, have a permanent value, and reduction works have recently been established at Rosita. A few carloads of the ore have already been shipped over the railroad from Labran to Denver. These new mines are so favorably situated with reference to accessibility, low altitude, proximity to good coal, and to fertile food-producing valleys, that their future is more than usually promising.

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620 But the most favorable circumstance for the immediate future of the Arkansas branch, is the fact that its completion to Cañon City and the construction of a fair wagon road from that town into the mountains westward, enables the freight and travel of the important San Juan silver and gold mines, of the rich valley and mines of the Gunnison, of Saguache and the rest of the San Luis Park, of the South Arkansas, Chalk Creek, and Upper Arkansas Valley generally—all of
621 which districts have greatly increased in importance since our last report—to be carried over the entire branch. Moreover the bulk of it will traverse the whole one hundred and sixty-one miles of main line and branch from Denver to Cañon City. As by the new wagon road from Cañon City it is but seventy miles thence to a common point at the foot of Puncha Pass (it being one hundred and ten miles from Colorado Springs, and one hundred and seventy miles from
622 Denver, to the same necessary point on the common highway), it is not likely that this trade will be cut off from the greater part of our line as heretofore—more particularly as the Cañon City route is the only one that does not cross high and impeding snow ranges. Important and varied as its resources appear to us to be, we anticipate more benefit from this than from any other early source in connection with the Arkansas division —perhaps not even excepting the constant growth
623 of the coal trade.

The freight carried on this branch during 1873 was - - - 14,979 tons
and the number of passengers was - 2,384.

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GENERAL REFLECTIONS.

Since the Denver and Rio Grande Railway was begun, the four counties of Colorado through which it now runs have increased their taxable appraisement of property, (according to the county assessors' returns) from $6,689,003 in
624 1870 to $18,602,217 in 1873, and there has been a large gain since.

In these three years, of which most of the growth took place in two, the increase in these four counties has been as follows: In Arapahoe County 3 fold; in Douglas County 3 fold; in El Paso County 4 fold; in Pueblo County 4 fold.

The whole increase in the twenty-one counties of Colorado was from $16,051,521 in 1870 to
625 $35,669,030 in 1873, or 120 per cent.

This is exclusive of the mines and much of the live stock, which escaped taxation.

In population, Pueblo County has quadrupled, Arapahoe and El Paso have more than trebled, and Douglas County has more than doubled, within the three years.

During the same period the population of Colorado increased from 29,000 to 130,000.

The taxable appraisement of Denver increased from $586,290 in 1863 to $9,531,100 in 1873, a
626 period of ten years, of which seven were prior to the introduction of the first railway.

Since the Denver and Rio Grande Railway was begun, four new, extensive and widely separated mining districts of silver and gold have been developed in Colorado, and are now regularly worked, so that their permanent importance is assured: The "Boulder," "South Park," "Hard-

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scrabble," and the "San Juan." From the statement of this fact, it will be recognized that
627 scarcely a limit can be set to the extent of future discoveries in this, the great mineral bearing range of the Continent, as railroad communication is extended through Southern Colorado and New Mexico, and westward into the mountains.

Several copper lodes have been discovered and worked to some extent recently near and west of Cañon City, which promise well. The ore is reported to assay 30 per cent. of copper.

Within a few months extensive and rich placers
628 of gold have been discovered on the La Plata River, beyond the San Juan country.

If one can judge from the present outlook, the emigration to Southwestern Colorado, if railroad communication were afforded, would be almost as rapid as that which has been seen to any Western Territory or State since the westward movement of population began in earnest in the United States—scarcely excepting even California.

As there is scarcely a possibility of the growth
629 indicated in this report being checked since Colorado is becoming more widely and favorably known, and more cheaply accessible every year, and new discoveries are constantly made; on the contrary every prospect of a continued gain in the future, until the Territory may be said to be "settled up," each bondholder and stockholder, judging from the data which have been given, to-wit: the present earnings, known resources, and that certainty of growth which seems to be a
630 natural law in this country, can form his own conclusions as to the intrinsic value and future of his investment.

Perhaps two or three only of the elements of traffic which have been recapitulated in this report might be adequate to the support of the road, but we submit that the combination of so many and such varied resources may be considered conclusive. It is only necessary to allow a year or two for the continued
631 operation of natural causes, already healthily at work, and there will be no further need of speculating about the matter. Unlike many railroads located in a rich, but purely agricultural country, this line is not dependent for success upon the ability to transport grain and other staples long distances to find a market. It has secured to it ready markets at home in the mines, manufactures, and among the graziers, tourists, and commercial classes. It is not dependent upon any special
632 interest or business. From the topography of the country and nature of its route, it has been shown to be exceptionally free from the risks of competing lines, and there is none now even threatening. By every rule the property should prove extremely remunerative.

The company's credit, as indicated by the market price of its bonds, has of course been affected by the panic, along with that of all other new railroads in the United States and many old ones.
633 But there is little doubt that those American railroads which have weathered the storm and punctually met all their obligations, will hereafter rank higher than ever; and, in the case of this company, we are convinced that there is no warrant for the temporary withdrawal of confidence.

The company pays up its men promptly—does not have outstanding bills; has never but once,

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and that but for a month, allowed itself to postpone its regular pay-day; and its home credit is
634 not exceeded by that of any railroad in the western half of the United States.

While we cannot of course guarantee earnings it has been shown in this report that the circumstances which depressed the net results of last autumn and winter and the spring of the present year were due entirely to the panic and were altogether temporary in their character; that they are now over, as indicated by the net monthly earnings, which are larger than ever before, and
635 that, for various reasons, including the exhaustion of supplies of lumber and merchandise during the panic, and the effect which the latter is likely to have in stimulating domestic emigration of those middle classes which are most apt to seek Colorado when anything occurs to loosen their business ties at their old homes—the rebound may with reason be expected to be greater than the fall.

The property is most valuable; every dollar of
636 the capital has been expended faithfully, and, we believe, with good judgment, for the sole interest of those who have contributed it; the enterprise is at least earning its yearly interest, and next year will probably show a surplus; it is capable of doing, with but slight addition to its capital, except for rolling stock, at least ten-fold the business it now has; and the country which it traverses is one of great resources, which are being developed as rapidly perhaps as those of any part of
637 the United States.

It is true the line is not advanced far enough to yield the best results *per mile*. A policy, which

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has since been proven to be *too* conservative, prevented our seeking the necessary capital at the end of the first year when it could then, without special difficulty, have been obtained to extend the line to Trinidad, and forced it to rely in a perfectly new country upon purely local resources.

638 At Trinidad the line would obtain the New Mexican trade beside the large cattle shipments and the coking coal and iron ores of the Raton Mountains to mix with those from Cañon City; at Santa Fé or Albuquerque it would do still better; but the best results per mile will unquestionably be shown when it reaches the El Paso terminus.

639 The growth, except in wool and cattle, does not take place very far ahead of the track. The road would, in our opinion, pay handsomely to-day if it were at El Paso, and nothing is gained by postponing its entire completion a moment after the requisite capital is obtainable.

640 The Board has always endeavored to keep in view, at the beginning of each half-year, the stern fact that at the end of that period was a *certain payment*, necessary to the preservation of its credit, which had to be made—no matter if all sorts of advantages and profits to the stockholders, and betterments to the security of the bondholders, must be sacrificed thereby. Within these bounds, however, we have deemed it best to exercise a sound business discretion in regard to outlays for additions to or extensions of the property. Hence, as it was most desirable and confidently expected that the line would be extended during 1873 to Trinidad, and as the work could at the time be done very cheaply, the company author-

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ized early in that year the grading of the most difficult part of that extension, to-wit, as far as
641 Cucharas, forty miles, the securing of right of way therefor, the building of a large brick depot and warehouse at South Pueblo for the expected trade, the purchase of two locomotives and some cars (as these are not to be had for narrow-gauge roads unless ordered some time ahead), the purchase of a valuable depot tract in Denver, in the heart of the city, of fifteen acres, or twenty-one acres including the streets, which it has a right to close, necessary for the permanent purposes of a
642 long through line, and the incurring of various other expenditures in connection with the said extension, such as engineering and legal services, management and printing.

As the panic immediately followed these outlays, for which an issue of $263,000 bonds was authorized by the trustees, the company has as yet obtained no benefit from them. Certain negotiations are under way, however, which render it likely that we shall do so, by the completion
643 of the line to Trinidad before the end of the present year, or soon thereafter.

None of the above named bonds, except $86,000, had been issued by the company at the close of 1873, and they therefore do not appear in the Auditor's Report.

Including such of them as has since been issued by the company to the present date, the interest obligations of the main line for the year 1874 will average, as heretofore stated, about $20,000
644 per month in currency.

By order of the Board.

WM. J. PALMER, *President.*

FINAL DECREE.

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And afterwards and on, to-wit, the 24th day of August, A. D. 1878, the same being one of the regular juridical days of the July term, A. D. 1878, of said court, present the Hon. Moses Hallett, district judge, the following order was had and entered of record in said court and in said cause, to-wit:

645 FINAL DECREE, BILL DISMISSED.

DENVER AND RIO GRANDE RAILWAY COMPANY, *vs.* EBENEZER T. ALLING ET AL. } In chancery. For injunction, &c.

This cause came on to be heard at this term of the court upon the pleadings of the parties respectively, and the testimony heard by the court in open court in pursuance of the stipulations of counsel:

646 And thereupon it is ordered, adjudged and decreed by the court that the plaintiff's said bill of complaint do stand dismissed at the cost of the said plaintiff; but with liberty to the said plaintiff nevertheless to at anytime hereafter exhibit its bill in this or any court of competent jurisdiction to compel the said Cañon City and San Juan Railway Company to adhere to its said line, or to compel said company to so locate and construct its line of railroad, or to so change the

647 line and grade thereof at any point or points, place or places in or along thereof, as to permit of the convenient and proper location and construction of the plaintiff's road, or to compel the defendant to permit the plaintiff to occupy the track and roadway of the defendant, if at any

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point in said defile it shall be impracticable to conveniently construct or safely operate two lines of railroad.

Ordered that the defendants recover their costs
648 and have execution therefor.

Thereupon the said plaintiff saith that it doth and will appeal from the decree aforesaid; and it is ordered that bond in the plaintiff's said appeal be approved by one of the justices of this court.

And afterwards and on, to-wit, the 28th day of August, A. D. 1878, came again the said complainant by H. A. Risley, Esq., its solicitor, and filed in said court and in said cause the affidavit of H. A. Risley as to value of matters in contro-
649 versy in said cause, and the said affidavit is in words and figures as follows, to-wit:

AFFIDAVIT OF VALUE.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO. } *ss:*

In the Circuit Court of the United States for the district of Colorado. Of July term, A. D. 1878. In equity.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
650 EBENEZER T. ALLING ET ALS.

Hanson A. Risley, being first duly sworn, says upon oath that he is the general solicitor of the

AFFIDAVIT OF VALUE.

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plaintiff herein; that he hath read the bill and answers in this above entitled cause, and knows the contents thereof; that he is acquainted with the matter in dispute in this cause; and the said matter in dispute, exclusive of costs, exceeds in value five thousand dollars.

And deponent saith that this affidavit is made
651 on behalf of the said plaintiff; and to show that the plaintiff is entitled to an appeal from the decree of this honorable court given at the above term, and further saith not.

(Signed) HANSON A. RISLEY.

Subscribed and sworn to before me this Aug-
[SEAL CIRCUIT ust 27th, A. D. 1878.
COURT, U. S.] (S'd) EDWARD F. BISHOP,
Clerk Circuit Court, U. S.

(Endorsed:) No. 154 Circuit Court, U. S.
652 Denver and Rio Grande Railway Co. *vs.* Ebenezer T. Alling et al. Affidavit of Risley as to value of matters in controversy. Filed August 28th, A. D. 1878. Signed, Edward F. Bishop, clerk. H. A. Risley, solicitor for complainants.

And afterwards, and on to-wit the 7th day of September, A. D. 1878, came again said complainant, by H. A. Risley, Esq., its solicitor, and filed in the said court and in said cause its bond in appeal, which said bond is in words and fig-
653 ures, as follows, to-wit:

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BOND IN APPEAL.

Supreme Court of the United States.

THE DENVER AND RIO GRANDE RAILWAY COMPANY
vs.
EBENEZER T. ALLING, M. N. MEGRUE, BENJAMIN F. ROCKAFELLOW, HENRY N. HOLBROOK, WILLIAM F. BAILEY, FRED. A. RAYNOLDS, WILLIAM R. MORLEY,
654 AARON A. ROBINSON, JAMES CLELLAND, THE ATCHISON, TOPEKA AND SANTA FÉ RAILWAY COMPANY AND WILLIAM B. STRONG.

Know all men that we, The Denver and Rio Grande Railway Company, a corporation organized under the laws of the State of Colorado, as principals, and R. F. Weitbrec, W. A. Bell and William Wagner, as sureties, are held and firmly bound unto Ebenezer T. Alling, M. N. Megrue,
655 Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, The Atchison, Topeka and Santa Fé Railway Company and William B. Strong in the sum of five hundred dollars, to be paid to the said Ebenezer T. Alling, M. N. Megrue, Benjamin F. Rockafellow, Henry N. Holbrook, William F. Bailey, Fred. A. Raynolds, William R. Morley, Aaron A. Robinson, James Clelland, The Atchi-
656 son, Topeka and Santa Fé Railway Company and William B. Strong, their executors or administrators; for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents. In witness whereof the said Denver and Rio Grande

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Railway Company hath caused its corporate seal to be affixed to these presents; and the said Weitbrec, Bell and Wagner hath set their hands and seals this sixth day of September, A. D. 1878.

657 Whereas the said Denver and Rio Grande Railway Company hath prayed an appeal to the Supreme Court of the United States to reverse the decree given in the above entitled cause by the Circuit Court of the United States for the district of Colorado, at the July term, A. D. 1878 of said Circuit Court; now therefore the condition of this obligation is such that if the said Denver and Rio Grande Railway Company shall prosecute its said appeal to effect and answer all

658 costs if it shall fail to make good its plea, then this obligation shall be void, otherwise in full force and virtue.

(S'd) THE DENVER & RIO GRANDE RAILWAY CO.
By H. A. RISLEY, *Solicitor.* [SEAL.]
(S'd) R. F. WEITBREC. [SEAL.]
(S'd) WILLIAM A. BELL. [SEAL.]
(S'd) WILLIAM WAGNER. [SEAL.]

[D. & R. G. R'Y CO. SEAL.] Attest: WM. WAGNER,
Sec. D. & R. G. R'y Co.

659 Bond approved and appeal allowed.

(Signed) MOSES HALLETT,
U. S. District Judge for the District of Colorado.

DENVER, Sept. 6, A. D. 1878.

(Endorsed:) No. 154. Circuit Court U. S. The Denver and Rio Grande Railway Company *vs.* Ebenezer T. Alling et al. Bond in appeal. Filed Sept. 7th, A. D. 1878. Signed, Edward F. Bishop, clerk.

CERTIFICATE OF CLERK.

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DISTRICT OF COLORADO, *ss:*

660 I, Edward F. Bishop, clerk of the Circuit Court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of bill of complaint, subpœna, amendment to bill, (first), stipulation and articles of incorporation of the Denver and Rio Grand Railway, amendments to bill (second), injunction, opinion Hallet, J., opinion Dillon, J., amendments to bill (third), stipulation, answer of Alling et al, answer of Strong
661 and Robinson, answer of Atchison, Topeka and Santa Fé Railroad, replication to answer of Alling et al, replication to answer of Strong and Robinson, replication to answer of the Atchison, Topeka and Santa Fé Railroad, stipulation as to oral testimony, stipulation as to testimony, certificate and report of oral testimony with the exhibits accompanying same, affidavit as to value of matter in controversy, and bond in appeal; and all orders and decrees of court had and entered of record in said
662 court in a certain cause in said court lately pending wherein the Denver and Rio Grande Railway Company was complainant and Ebenezer T. Alling

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et al were defendants as fully as the same still remain filed or of record in my office.

In testimony to the above I do hereunto sign my name and affix the seal of said court at Denver, in said district, this day of September, A. D. 1878.

, *Clerk.*

663 Clerk's fees, folios @ 10c. and certificate, $.

Paid by